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82-698

No.

IN THE

Supreme Court of the United States

October Term, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,

Petitioners,

v.

WALTER ROBERT TAYLOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. ARE PURELY PRIVATE CONSPIRACIES TO VIOLATE FIRST AMENDMENT RIGHTS ACTIONABLE UNDER 42 U.S.C. § 1985(2)(3)?

2. WHETHER UTILIZATION OF A STATE COURT TRIBUNAL BY PRIVATE PERSONS CAN CONSTITUTE ACTIVE STATE PARTICIPATION SO AS TO SATISFY THE REQUIREMENTS OF 42 U.S.C. § 1985, WHERE THE STATE ACTOR IS NEITHER A DEFENDANT NOR ALLEGED TO BE PART OF THE UNLAWFUL CONSPIRACY, OR AN ACTIVE PARTICIPANT THEREIN?

3. WHERE THE RIGHTS ALLEGED TO HAVE BEEN VIOLATED ARE THOSE WHICH ARISE UNDER THE FIRST, FOURTH, FIFTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND NOT THE RIGHT TO BE FREE FROM RACIAL DISCRIMINATION (THIRTEENTH AMENDMENT) OR OF INTERSTATE TRAVEL, AND THE SOURCE OF CONSTITUTIONAL POWER IS ONLY THE FOURTEENTH AMENDMENT, WHAT DEGREE OF STATE PARTICIPATION (IF ANY) IS REQUIRED UNDER 42 U.S.C. § 1985?

PARTIES

In the United States Court of Appeals for the Tenth Circuit, the parties were: Walter Robert Taylor, appellant, and Wayne N. Howard, Michael E. Trauscht, Joseph Alexander, Esther Alexander, Kevin M. Gilmartin, Gary Scharff and the Freedom for Thought Foundation, Inc., appellees. All of these parties have an interest in the filing of this petition.

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WAYNE N. HOWARD and MICHAEL E. TRAUSCHT, Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit in the entitled case rendered on July 30, 1982.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. In his Memorandum of Decision and Order filed December 30, 1978, United States District Court for the Western District of Oklahoma, Fred J. Daugherty, Judge, granted the Motion for Summary Judgment of Petitioners stating that there was no action under color of state law by Defendants nor was there any conspiracy with a state actor alleged, nor that degree of active state participation so as to preclude summary judgment on the federal questions. Summary judgment was entered against Respondent on all federal questions, respectively, in the Memorandum of Opinions appearing in the Appendix hereto.

Certain state tort counts remained after Judge Daugherty's action and the case was tried to jury with directed verdict motions as to some state tort counts being granted and a jury verdict as to the remaining state tort count being received and made part of the Judgment on Jury Verdict entered on January 16, 1981. An appeal from the Judgment on Jury Verdict and the summary judgments issued on the federal questions was taken by Plaintiff to the United States Court of Appeals for the Tenth Circuit, which Court, by opinion rendered July 30, 1982, affirmed the Judgment of the District Court under 42 U.S.C. § 1983, but reversed the

Judgment of the District Court and remanded the cause for further proceedings consistent with the Opinion as to the claims which arise under 42 U.S.C. § 1985(2) and (3).

JURISDICTION

This is a controversy founded upon Plaintiff's assertion of causes of action arising under 42 U.S.C. § 1985(2) and (3). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1985(2): "If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand jury or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

§ 1985(3): "If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or properly on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

Plaintiff, WALTER ROBERT TAYLOR, alleged that he was the subject of a religious deprogramming by the Defendants as a result of his membership in a cult. WAYNE N. HOWARD acted as an attorney for the Plaintiff's parents and applied to the Probate Court in Oklahoma City County, Oklahoma, for orders of temporary guardianship over the person of the Plaintiff. After the proposed ward was brought before the Probate Court judge, he issued orders of temporary guardianship, placing the Plaintiff in the custody of his father.

Ten days of counseling followed which Plaintiff characterized as "deprogramming". After returning to the cult, Plaintiff instituted suit against his parents, two attorneys, a psychologist and certain private persons who served as lay therapists. Plaintiff did not join any state actor or a state agency as a defendant, nor did he allege active participation or a conspiracy with any state actors to deprive him of any constitutional freedoms.

In ruling upon the Motions for Summary Judgment filed by all Defendants, the United States District Court for the Western District of Oklahoma held, with respect to the questions here presented, that the mere utilization of the state judicial process did not constitute state action under 42 U.S.C. § 1983. Furthermore, Judge Daugherty held that since the rights alleged to have been violated arose under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, with no allegations of racial discrimination or interference with interstate travel, the source of power to reach the conspiracy was the Fourteenth Amendment. The District Court then found no evidence of active state participation, connivance or shared motives, and entered summary judgment as to all federal questions, Appendix at 100-13.

The United States Court of Appeals for the Tenth Circuit, by Opinion dated July 30, 1982, disagreed and reversed as to the questions which arose under 42 U.S.C. § 1985. Acknowledging that the Appellant did not claim active state participation in the conspiracy to deprive him of his constitutional rights, Judge Doyle nonetheless found that a private conspiracy "to induce the state to violate one's First and Fourteenth Amendment rights is remedied by § 1985(2) and

(3)." The court acknowledged that the Appellee's use of the state court to attain an allegedly unconstitutional goal was not tantamount to action "under color of state law" as defined by § 1983, but found that a private conspiracy which takes advantage of the state judicial system or "brings the state into a position" that it is an unwitting, non-active participant in the alleged deprivation of rights constitutes that degree of state involvement as to satisfy the requirements of 42 U.S.C. § 1985. The "unwitting deprivation" of constitutional rights by the state was found by the actions of the sheriff's deputies in bringing the proposed ward before the probate judge pursuant to court order and in the court's appointment of the father as temporary guardian without jurisdiction or statutory authority to do so. Appendix at 64, 66.

REASONS FOR GRANTING THE WRIT

1. THE POINT DECIDED BELOW WAS EXPRESSLY RESERVED AND LEFT UNDECIDED BY THE SUPREME COURT.

In *Griffin v. Breckenridge*, 403 U.S. 88, 107 (1971), this Court expressly reserved the determination of the question which is presented in this case.

> "In identifying these two constitutional sources of Congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under §5 of the Fourteenth Amendment.[12] By the same token, since the allegations of the complaint bring this cause of action so close to the constitutionally authorized core of this statute, there has been no occasion here to trace out its constitutionally permissible periphery."

In *Griffin v. Breckenridge*, this Court pointed out that

whether or not *Collins v. Hardyman*, 341 U.S. 651 (1951), was correctly decided *on its own facts* was a question with which the Court was not concerned. In *Collins v. Hardyman*, the defendants' conspiracy was purely private in nature and in no way associated with state or official action. In the instant case, the Tenth Circuit Court of Appeals relied predominantly on this Court's opinion in *United States v. Guest*, 383 U.S. 745 (1966), but fashioned a new rule of law equating "unwitting deprivation" and "tacit connivance" with active participation by a state actor. This point was expressly reserved by this Court in *Griffin v. Breckenridge* and has yet to be decided. This is a sound basis for issuance of the writ. *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976).

2. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS AND PREVIOUS DECISIONS OF THE SUPREME COURT.

The Tenth Circuit Court of Appeals misconstrued, misapplied and misconceived this Court's reasoning in *United States v. Guest, supra.* See *Schlude v. Commissioner*, 372 U.S. 128, 130 (1962). There is a square conflict between the reasoning of the Circuit Court and this Court on the point of active participation versus unwitting connivance and there is a need for a uniform rule on this point. *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962). To resolve this conflict of an important question of federal law which has not been, but which should be settled by the Supreme Court, this petition should be granted.

The only participation of the state in the activities complained of below was the alleged wrongful use of the judicial system and the Sheriff's Office in Oklahoma County,

Oklahoma. At no time did the Plaintiff allege that the probate judge did anything more than act in the judicial capacity to hear evidence and grant an Order of Temporary Guardianship, nor did he allege that the Sheriff of Oklahoma County did anything more than carry out an order of the Probate Court judge to bring the proposed ward before the Court for examination. The Probate Court's role in the case came to an end with the issuance of its order delivering the Plaintiff into the custody of his father as a temporary guardian.

Recognizing that no violation of Thirteenth Amendment rights or the right of interstate travel was alleged by the Plaintiff, the Tenth Circuit Court of Appeals looked to the Fourteenth Amendment as the applicable source of power to reach the conspiracy alleged. It then proceeded to find, however, adequate state involvement as a result of the "co-operation of the judge and the Sheriff's officers . . ." in the use of the state judicial system and in the Sheriff carrying out an order that the proposed ward be brought before the Court for examination. Appendix at 55. This equation is squarely in conflict with the prior holdings of this Court.

The Tenth Circuit Court of Appeals relied primarily on this Court's holding and reasoning in *United States v. Guest, supra.* In its companion case, *United States v. Price*, 383 U.S. 787 (1966) the defendant co-conspirators included three Mississippi law enforcement officials who conspired to release the victims from jail, intercept, remove and transport them to a certain designated place where the assaults took place. In *United States v. Guest, supra*, there were no state actors joined as defendant co-conspirators. What is critical to a correct reading of *Guest*, however, is that the Fourteenth Amendment protects the individuals only against state action,

not against wrongs done by individuals and *the degree of state action found sufficient in the case was the equivalent of active participation by the state*. 383 U.S. at 755. Justice Stewart noted that the indictment in fact contained an express allegation of state involvement by pointing out that one of the means of accomplishing the object of the conspiracy was "By causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts." *Id.* at 756. It was the *state* which allegedly created the false reports and thus initiated the arrests of the victims. In a very important passage, this Court pointed out that in *Bell v. State of Maryland*, 378 U.S. 226 (1964), three members of the Court expressed the view that a private person's invocation of state police and judicial action to carry out his own policy of discrimination was sufficient to create rights under the Equal Protection Clause in persons against whom racial discrimination was directed. Three other members of the Court strongly disagreed and three expressed no opinion at all. The Court intimated, however, that if the indictment in *Guest* charged no more that merely cooperative private and state action similar to that involved in *Bell v. State of Maryland* [the record was unclear as to the extent of official involvement], no Equal Protection Clause rights were created. Furthermore, *Bell v. State of Maryland, supra*, at least insofar as it relates to 42 U.S.C. § 1985(3), has been soundly addressed and satisfied by Justice Stewart's reasoning in *Griffin v. Breckenridge* that racial discrimination as a result of a private conspiracy is in and of itself actionable under the statute per the Thirteenth Amendment.

Most importantly, this Court in *United States v. Guest* pointed out that the allegation was broad enough to cover a charge of *active connivance* because the state made the

false reports or engaged in conduct tantamount to *official discrimination* as opposed to mere invocation of state police and judicial power by private citizens. Clearly, in the instant case, there are no allegations of active connivance or official discrimination by state actors, but mere utilization of the judicial system and the local law enforcement official carrying out the order of the court.

Notwithstanding the clear direction given by the Supreme Court in *Guest*, and the acknowledgment of the legislative history of the 1871 Civil Rights Act wherein Senator Edmunds stated that there was no intention in the Bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud or one man or set of men against another to prevent one getting an indictment in the state courts, the Tenth Circuit Court of Appeals proceeded to equate utilization of the state judicial system with "causing the state to participate and deprive the plaintiff of his liberty." Appendix at 50, 55. It has long been held in the various circuit courts which have addressed the question that mere utilization of the state judicial system does not make the state an active participant in any alleged deprivation of fundamental rights. *Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969); *Hall v. McClellan*, 490 F.2d 859 (5th Cir. 1974); *Sykes v. State of California (Department of Motor Vehicles)*, 497 F.2d 197 (9th Cir. 1974); *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965).

The reasoning of the Tenth Circuit Court of Appeals presents a direct conflict between the decision of the Tenth Circuit and the previous opinions of this Court. The notion that sufficient state participation can be found where private

parties conspire "to induce the state to deprive an individual of his constitutional rights" by mere utilization of the state judicial system is clearly incorrect. No matter how the Circuit Court characterizes the *result* of the utilization of the state court system (private conspirators "cause the state to participate" or coerce the state to "unwittingly deprive the plaintiff of certain rights" or made the state a "silent partner"), the *activity* of the state is still completely and totally indirect: application to and utilization of the state court system. Such participation never has been the basis for satisfying the requirement of state involvement for the purposes of the Fourteenth Amendment, nor is there any legislative history to bear out such an interpretation as has been noted by several commentators.[1]

It must be noted that there is no allegation in the case below that the Probate Court judge shared the allegedly improper motives or in any way participated in an attempt to change certain beliefs of the Plaintiff. The Tenth Circuit strained to equate the conduct of a hearing before a state Probate Court and an Order of Temporary Guardianship placing the Plaintiff in the custody of his father with "participat[ion] in coercing a change in this adult's religious beliefs and it was but a prelude to what was to happen." Utilization of the state judicial system, absent some direct participation or sharing of the conspiratorial motives by the state judicial officer, is at best limited state involvement and not the

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[1] Vermeire, *Deprogramming From the Defense Counsel's Perspective*, 84 W. Va. L. Rev. 91, 111-19 (1982); Wildman, *42 U.S.C. § 1985(3)—A Private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved*, 17 S.D. L. Rev. 317 (1980); Comment, *A Construction of Section 1985(c) In Light of Its Original Purpose*, 46 U. Chicago L. Rev. 402 (1979); Note, *The Scope of Section 1985(3) Since Griffin v. Breckenridge*, 45 G.W.U. L. Rev. 239 (1977).

extensive type of participation discussed in *United States v. Guest.* The very essence of the incorrect analysis undertaken by the Tenth Circuit is borne out by its conclusion that although the appellant did not claim that the state conspired to deprive him of his constitutional rights, he did claim "that the state unwittingly deprived him of those rights" when the Sheriff's deputies carried out the court's order requiring the proposed ward to be brought before him and when the probate judge proceeded to appoint the father as a temporary guardian. Appendix at 66. This case presents a basic confrontation between two concepts which must be resolved: *Inducing* the state to allegedly violate a First or Fourteenth Amendment right by participating in no more than a judicial hearing cannot satisfy the requirement of active participation, active connivance or official discrimination.

3. THERE IS CLEARLY A NEED FOR A UNIFORM RULE ON THIS POINT.

The Tenth Circuit quoted Justice Stevens' separate concurrence in *Great American Savings & Loan Association v. Novotny,* 442 U.S. 366, 383-84 (1979), but clearly misinterpreted his meaning. Justice Stevens was pointing out that as to other privileges and immunities of citizenship such as those rights alleged to have been violated in the instant case, citizens are protected by the Constitution only against state action or conspiratorial action *with the state* that prevents or hinders the giving or securing of equal treatment. In footnote 5 to the concurring opinion, Justice Stevens pointed out that he paraphrased the statutory language because it sheds important light on the meaning of the entire section. *Id.* at 384, n.5. He went on to point out, however, that while § 1985(c) does not require the same requirement of action

under color of state law as does § 1983, "there still can be no claim for relief based on a violation of the Fourteenth Amendment *if there has been no involvement by the State.*" *Id.* This "involvement" as explained in *United States v. Price* and *United States v. Guest, supra,* must be active in nature. It cannot be merely tacit, unwitting or passive in the sense of the utilization of the state judicial system to bring about an end which is the object of an otherwise purely private conspiracy. Nor did the Tenth Circuit acknowledge Justice Powell's concurring opinion in the same case in which he noted this Court's dicta in *Griffin v. Breckenridge* that § 1985 was not intended to apply to all tortious, conspiratorial interference with the rights of others, "Nor does the Constitution create any right to be free of gender-based discrimination perpetuated solely through private action." *Id.* at 381.

4. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. § 1985.

Three distinct approaches in resolving this issue have been endorsed in the various Circuit Courts of Appeals. They are as follows:

A. The requirement of state involvement under § 1985 is co-extensive with that required under § 1983, although the language of the two sections differs. THIRD CIRCUIT, *Phillips v. Trello,* 502 F.2d 1000 (3rd Cir. 1974); FOURTH CIRCUIT, *Bellamy v. Masons Stores, Inc.,* 508 F.2d 504 (4th Cir. 1974); SEVENTH CIRCUIT, *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972); EIGHTH CIRCUIT, *Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975); TENTH

CIRCUIT, *Taylor v. Nichols,* 558 F.2d 561, 564 (10th Cir. 1977).

B. Although not co-extensive with the state action requirement under § 1983, some degree of active state participation beyond mere tacit connivance or passive cooperation is required. SECOND CIRCUIT, *Weise v. Willow Tree Civic Association,* 467 F. Supp. 803, 813-14 (S.D.N.Y. 1979) *citing the absence of clear direction in Weiss v. Syracuse University,* 522 F.2d 397 (2nd Cir. 1975); SIXTH CIRCUIT, *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973); NINTH CIRCUIT, *Lopez v. Arrowhead Ranches,* 523 F.2d 924 (9th Cir. 1975).

C. Purely private conspiracies with no state involvement whatever are actionable under § 1985. THIRD CIRCUIT, *Richardson v. Miller,* 446 F.2d 1247 (3rd Cir. 1971); EIGHTH CIRCUIT, *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971).

Furthermore, there is a conflict within the same circuit in at least three instances. Compare the Tenth Circuit's opinion in the instant case with its opinion in *Taylor v. Nichols, supra.* The same is true within the Eighth Circuit; compare *Means v. Wilson, supra,* with *Action v. Gannon, supra,* and the Third Circuit; compare *Phillips v. Trello, supra,* with *Richardson v. Miller, supra.*

There are a considerable number of suits pending in the lower courts which will turn on the resolution of this issue. See *Massachusetts Trustees v. United States,* 377 U.S. 235, 237 (1964). The timing is now propitious to resolve this long-standing question of substantive federal statutory interpretation.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,
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October, 1982.

CERTIFICATE OF SERVICE

The undersigned Albert R. Vermeire, a member of the Bar of this Court and counsel of record for Wayne N. Howard, Petitioner herein, hereby certifies that on the 18th day of October, 1982, he caused to be served the foregoing Petition for Writ of Certiorari on all parties to this appeal by mailing copies thereof by First Class mail, postage prepaid, addressed to their attorneys, as follows:

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Respondent.

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SLIP OPINION

UNITED STATES OF APPEALS

TENTH CIRCUIT

WALTER ROBERT TAYLOR,	)	
	)	
Plaintiff-Appellant,	)	NO.
	)	
vs.	)	81-1215
	)	
KEVIN M. GILMARTIN, MICHAEL E. TRAUSCHT, WAYNE N. HOWARD, FREEDOM OF THOUGHT FOUNDATION, INC., JOSEPH ALEXANDER, ESTHER ALEXANDER, and GARY SCHARFF,	)	
	)	
Defendants-Appellees.	)	

Appeal from the United States
District Court For The
Western District of Oklahoma
(D.C. No. Civ-77-0351-D)

John C. McMurry, Oklahoma City, Oklahoma. (Martha McMurry, Oklahoma City, Oklahoma, with him on the brief) for Plaintiff-Appellant.

William A. Johnson, Sanders, Boone & Johnson, Oklahoma City, Oklahoma, for Defendants-Appellees Gilmartin, Freedom of Thought Foundation, Inc., Joseph Alexander, Esther Alexander, and Gary Scharff.

John B. Hayes, Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Defendant-Appellee Trauscht.

Albert R. Vermeire, Monbleau, Vermeire & Turley, Phoenix, Arizona, for Defendant-Appellee Howard.

Before DOYLE and SEYMOUR, Circuit Judges, and ANDERSON, District Judge*.

DOYLE, Circuit Judge.

Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.

Appellant seeks reversal of several judgments which grow out of the entry of summary judgments.

The actions arise out of alleged civil rights and common law claims. The former arise under 42 U.S.C. Sections 1983, 1985(2) and (3). The complaint describes conspiracy to commit legal malpractice, intentional infliction of emotional distress,

false imprisonment and conspiracy to commit assault and battery. The appeal is pursuant to 28 U.S.C. §1291. The essence of the case is an attempted religious deprogramming effort together with the means which were employed to accomplish the objective. The charges revolve around the particular circumstances which led up to the deprogramming, the actual techniques which were employed in an effort to persuade the subject to abandon the religion which he had adopted.

All of this commenced when Taylor took up residence in the monastery of the Holy Protection of the Blessed Virgin Mary, a local religious organization, in Oklahoma City, Oklahoma. Appellant had reached the age of 21 when the deprogramming effort occurred.

Taylor's parents were opposed to his joining the religion and in July of 1976 they took the action which led to this cause. They employed an organization called the Freedom of Thought Foundation, a corporation which carries on the business of deprogramming religious zealots. Deprogramming is a process of attempting a psychological shock treatment on members of non-mainstream religious sects in an effort to sever their involvement with a religious cult lifestyle.

As part of the program, appellant's father, through Freedom of Thought, applied to the Oklahoma County District Court to be appointed as "temporary" guardian of the appellant. Appellees Howard and Trauscht, lawyers for Dr. Taylor, the father of appellant, visited Judge John A. Benson, an

Oklahoma state district judge who was temporarily assigned in Oklahoma City, and conferred with him ex parte. They asked him to hear the case. Benson contacted the Probate Judge who would ordinarily hear such a matter and obtained permission to hear it. Only after that was the petition for a guardianship filed. Judge Benson ordered the temporary guardian of plaintiff's person be appointed in order to determine whether plaintiff was under the influence of a religious cult. Judge Benson said that he wanted the plaintiff taken into custody "so that (plaintiff) could be given notice of a [permanent] guardianship hearing." Plaintiff was at the monastery when the deputies came for him. He offered no resistance. The hearing occurred before Judge Benson as soon as Taylor was

brought in to court. Although Judge Benson found him to be normal, he formally entered an "order appointing Taylor's father as Temporary Guardian of the Person." The reason for the Judge's action was

> ". . .the right of [Plaintiff's] father and. . .family to know [Plaintiff] decided. . .to spend the rest of [his] life away from them secluded in a monastery. . . probably overrides any individual right [Plaintiff] might possibly have on a temporary basis. . . to be free from. . .custody." PX 1 at p. 52

The July 15, 1976 order also provided:

> 1. Notice of the time and place of hearing is not required.
>
> 2. Dr. Walter Taylor is appointed the Temporary Guardian of the Person of Petitioner's child, to-wit: Walter Robert Taylor and that temporary Letters of Guardianship issue.
>
> 3. The Temporary Guardian of the person shall have power to: (a) take said proposed ward into Petitioner's personal custody to have proposed ward counselled,

> examined, and treated by persons including, but not limited to physicians, psychiatrists, psychologists, social workers and lay persons; (b) to keep said ward in Petitioner's custody, even in the event said ward wishes to leave said custody; and (c) such further powers as are necessary to exercise those above granted.
>
> 4. Further hearing in this matter will be held at August 13, 1976 at 3:00 P.M. at which time the ward is directed to show cause if any the ward has, why the Petitioner, Dr. Walter Taylor, should not be appointed permanent Guardian of the ward's person,. . .

On the basis of the order heretofore cited, plaintiff was taken that same day, that is July 15, 1976, from Oklahoma City, Oklahoma to Akron, Ohio. He was not examined by physicians or psychiatrists. The only examination occurred on July 24 which was performed by Dr. Gilmartin, a psychologist, with apparently some experience in treating cult members. Taylor was held for approximately one week in Akron where

he was kept at a motel and under constant guard. There followed the deprogramming. Taylor testified that he was abused in the following manner:

1. The defendants yelled at him constantly.

2. The deprogrammers worked in shifts or crews.

3. They said that they would have him tracked down by the state patrol if he escaped; that they would have him thrown in jail and deprogrammed in jail.

4. The deprogrammers threatened to have the police close down plaintiff's monastery; to have the temporary guardianship made permanent and to have the deprogramming continue indefinitely, to have plaintiff committed to a mental institution and to beat him.

5. He was deprived of sleep and was told that he would be subject to shock treatment. He suffered severe gastritis, diarrhea and abdominal cramping and when he complained, the deprogramming seemed to intensify.

6. They threw cold water on him, shined a light in his eyes, tore his clothing off, cut his hair and beard and they told him they called friends and religious leaders from

> a list plaintiff had given them of people who would vouch for him, and they stated that the friends reported his religion was not legitimate. The deprogrammers indicated the pressure would cease if plaintiff would renounce his religion.

On July 23rd or 24th, 1976, plaintiff was taken from Akron to Phoenix, Arizona, where apparently his mother was staying. He was held, still under guard, for the rehabilitation phase of the deprogramming. However, he escaped July 31, 1976 and returned to Oklahoma City and to the seminary. He has been there ever since. The record does not indicate that any effort was made to remove him from the seminary after this. Subsequently, Taylor instituted this present suit in the United States District Court for the Eastern District of Oklahoma against not only the deprogrammers,

but also his parents and his brother. However, the Taylor family members were dismissed by an agreement prior to trial. The deprogrammers remain.

In his complaint Taylor sought damages compensatory and punitive. On December 30, 1978, the trial judge entered an order dismissing the § 1983 claim on the ground that the complaint failed to allege that the defendants acted under color of state law. The court rejected the defendants' contention that use of the Oklahoma state court for Dr. Taylor's appointment as temporary guardian and plaintiff's seizure by local police was tantamount to state action. The reason was that the Oklahoma judge and the police were ruled not to be members of any conspiracy with defendants, in that they did not share common goals; neither

were they charged as defendants. However, on the same day the court granted partial summary judgment dismissing the claim for conspiracy to violate Taylor's civil rights pursuant to § 1985(3). The lower court noted that in Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court held that § 1985(3) encompassed a private conspiracy to violate thirteenth amendment rights and the right to interstate travel. However, the claim below failed because, as the court saw it, Congress did not have the power to reach a private conspiracy to violate rights protected under the fourteenth amendment. The judge rejected plaintiff's argument that § 5 of the fourteenth amendment provided the Congressional power.

A third cause of action was dismissed on December 30 of the same year. This was the legal malpractice claim against Wayne Howard and Michael Trauscht. Taylor's claim was that Howard and Trauscht, as attorneys, participated in experimental psychological treatment on plaintiff, filed an illegal guardianship proceeding in Arizona and lied to the Oklahoma court. The lower court found no attorney-client relationship between these defendants and Taylor and continued that this, as a matter of law, could not result in liability.

On December 28, 1979, the trial court granted a partial summary judgment for defendants on the conspiracy cause of action with respect to obstructing justice pursuant to 42 U.S.C. § 1985(2). The court's

reasoning was the same as in the order on the §1985(3) conspiracy claim. The orders entered on December 30, 1978 and December 28, 1979 were made applicable to all defendants by the order of July 8, 1980.

The matter of intentional infliction of emotional distress, which was also charged in the complaint, was disposed of on directed verdict. The court said that reasonable minds could not differ that defendants' conduct was not so extreme and outrageous as to call for recovery. Similarly, a directed verdict was granted to the defendants on the false imprisonment claim because the Oklahoma state court's temporary guardianship order was ruled proper.

The jury returned a verdict in defendants' favor on the one count that was submitted to the jury, the

assault and battery claim which would appear to have been the weakest claim in the entire complaint in that there was no evidence indicating that assault and battery in the ordinary sense occurred.

We take up on appeal the propriety of the trial court's directed verdict on the tort claim of false imprisonment and intentional infliction of emotional distress, as well as the summary judgment orders on the civil rights statutes.

THE INVALIDITY OF THE STATE COURT'S TEMPORARY GUARDIANSHIP ORDER

The Oklahoma law is very specific regarding the appointment of guardians. See Title 58 §§ 851-52. Section 851 provides that any relative or friend of the proposed ward can petition the court as to the insanity or mental

incompetency of the ward. Notice must be given to the alleged incompetent and to a near relative at least five days before the hearing. The form of notice to the near relative is at the court's discretion, however; the statute does not provide for the manner of notice to be given to the ward. Under § 852 a guardian may be appointed only after a full hearing where it appears to the judge that the alleged incompetent is incapable of "taking care of himself and managing his property." When using the terms "mentally incompetent", "incompetent" and "incapable", as above, these are defined as including one who is not adjudicated insane but, because of old age, disease, weakness of mind or other reasons, is unable without assistance to

adequately care for his person or his property and, therefore, could be deceived by artful or designing persons. In Re Guardianship of Bogan, 441 P.2d 972 (Okla. 1968). Appellees' petition in the state court did allege that Taylor was incompetent under the definition of Bogan. However, at the temporary guardianship hearing no evidence was adduced from Dr. Taylor that Walter was unable to take care of himself or his property or that he had any property that others could by trick or deceit remove from his control. Indeed appellant testified that the monastery took none of his assets. Dr. Taylor testified that the monastery took everything his son had but did not detail what this may have been. It seems evident that appellant did not have or give over to the monastery

any assets of substantial value. There is no need to decide whether the guardianship order under § 852 was inappropriate because of lack of evidence as to mental infirmity, for there are serious jurisdictional errors to be considered.

The case of Tiger v. McCallom, 89 Okla. 249, 214 P. 194, 195 (1923) holds that Oklahoma law is settled that the appointment of a guardian is uniquely a creature of statute. In the absence of full compliance the court lacks jurisdiction and the order is void. See Martin v. O'Reilly, 81 Okla. 261, 200 P. 687 (1921). There is no Oklahoma law to be found allowing a temporary guardianship of an adult such as was carried out by Judge Benson. The section referred to above, § 851,

requires five days notice prior to the guardianship hearing. Appellees contend that Taylor received thirty days notice because Judge Benson personally notified appellant when he was before him that the permanent guardianship would be held thirty days hence. That does not cure the failure to give notice of the initial hearing appointing a temporary guardian. That is just one of the problems with it. However, the real issue is the inadequacy of the hearing and the temporary order that was issued. The only conclusion to be drawn is that Judge Benson's action was beyond the statutes and was void from the very beginning. The court, as we view it, acquired no jurisdiction to hear this proceeding under § 852 until the five days notice had lapsed. In Re Winnett's

Guardianship, 112 Okla. 43, 239 P. 603 (1925).

It is the position of the appellees' that Okla. Stat. Tit. 43A, § 55 gives broad powers to a district judge to order temporary guardianship while a competency determination is made. This is not so. Examination of this statute in the light of the procedures employed by Judge Benson shows that under no stretch of the imagination does § 55 serve to shield appellees. As originally enacted in 1956 § 55 permitted the court to detain the alleged mentally ill person "in some suitable place" for up to thirty days until his petition was heard. Such temporary detention could only be brought about if there was testimony satisfying the judge that the individual was violent or that he would

injure himself. The 1975 amendment to § 55 altered the temporary detention language. As this statute stood at the time of Taylor's hearing, on July 15, 1976, the court was empowered to detain appellant in some appropriate medical facility in the county where proceedings were pending for no longer than seventy-two hours, including Saturdays, legal holidays and when the district court was not officially in session. But this could be done only if it was shown, as had been true under the 1953 act, that the alleged mentally ill person was violent or might injure himself or others.

Apart then from the failure to comply with the temporary detention requirements of § 55, it is plain that the hearing in Judge Benson's court

was not styled as a mental health hearing to determine whether Taylor should be committed to the state mental hospital or to a private facility, as required by statute. Apparently the judge fashioned this order to suit something that was not even provided for in any statute. Appellees' petition to Judge Benson, as mentioned above, invoked only the language of 58 O.S. § 851. Section 55 requires a petitioner to seek an order directing the hospitalization of one who is asserted to be mentally ill. Committment was not a subject even mentioned at the temporary hearing.

Section 55 requires that upon receiving the petition the court appoint a sanity commission under § 54, Title 43A. This commission is to be composed of two qualified

examiners and one licensed actively practicing attorney and is to certify its findings on the mental health of the person under examination. Judge Benson, of course, appointed no sanity commission. The judge considered the guardianship order to be for the purpose of determining whether Taylor had been brainwashed in the monastery, not whether he was mentally ill and should be hospitalized, an objective which, of course, is not provided for in any Oklahoma statute. If Taylor had been committed pursuant to §§ 54 and 55 under the procedures observed by the state court, the commitment would have to be reversed for the failure to follow the procedures of these sections. This failure is not harmless error. In Re D.B.W. 616 P.2d 1149 (Okla. 1980).

Due to the fact that no statutory jurisdiction gave rise to this temporary guardianship order and due also to the fact that there was no proper notice, even were we to assume authority for the proceeding, the order is void.

THE VALIDITY OF THE FALSE IMPRISONMENT CLAIM

The trial court directed a verdict for the appellees on the false imprisonment claim and the reason for that was the trial court's determination that Judge Benson's temporary guardianship order was proper; that any imprisonment could not be false in view of the lawfulness of the order. We must disagree with the action taken by the trial court.

The argument of the appellees is that the false imprisonment claim is a collateral attack on the temporary guardianship orders. Where a judgment

appointing a guardian appears to be regular on its face, so it is argued, there is jurisdiction for such an order and it cannot be attacked collaterally. The case that is cited is Bartlett v. Bell, 257 P.309 (Okla. 1927). Concededly, though, where the order is void on its face, a collateral attack is permissible. Mock v. Stricklin, 315 P.2d 247 (Okla. 1957). In the case before us the facts are such as to support the conclusion that there is a lack of jurisdiction and voidness in Judge Benson's order. The temporary guardianship order no longer exists. It was dissolved by Judge Benson on August 19, 1976. There remains, however, the question whether the order purporting to create a temporary guardian shields the deprogrammers from legal action.

It is, of course, fundamental that an action for false imprisonment arising from a committment or guardianship order is not cognizable where there has been regular and legal process observed, where the order is regularly issued with authority to issue the order and lawfully executed.[1] In the

> A person who causes the arrest of another in a civil proceeding must answer in damages even though the arrest was in pursuance of an order of court, when the court issuing the order has exceeded its jurisdiction, or had no authority to do so.

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1. Guzy v. Guzy, 16 Misc. 2d 975, 184 N.Y.S. 2d 161 (1959), aff'd. 11 App.Div. 2d, 206 N.Y.S.2d 355 (1960); Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 365 (1954); Dedrick v. Durham, 136 Wash. 265, 239 P.385 (1925). See. Yahola v. Whipple, 189 Okla. 583, 118 P.2d 395, 397 (1941).

decision of the Oklahoma court in Yahola v. Whipple, 189 Okla. 583, 118 P.2d 395, 397, the court said: Process is regular on its face when it comes from a court with authority to issue process of the kind in question, is legal in form and contains no signs that would fairly apprise one that such process is issued without authority. Jackson v. Osborne, 116 Cal. 2d 875, 254 P.2d 871, 876 (1953).

From a consideration of the statutes of Oklahoma in relationship to Judge Benson's order, it must be concluded that under those applicable statutes such a temporary guardianship order imposed on an adult was, and is, beyond the state court's power. An unauthorized judicial command furnishes no protection to those who act under it. Weigel v. Brown,

194 F. 652, 656 (8th Cir. 1912). In view of the fact that this order was void, the false imprisonment claim should have been submitted to the jury.[2]

THE CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSED BY DEPROGRAMMING

The plaintiff relies on the following to show that the conduct of the deprogrammers was extreme and outrageous. He points to his having been forcefully and against his

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2. Appellant argued below that the order of Judge Benson was void because Taylor was not permitted counsel of his choice, a man connected with the Old Catholic monastery. Moreover, Taylor claims that the state court's order was void because a second state judge later countermanded Judge Benson's temporary guardianship order. In view of our decision on the false imprisonment claim, we need not address these alternative grounds for decision.

will, removed from his chosen environment and removed also to another state and to his being kept there for a period of several days while they went through this deprogramming. He also relies on the evidence described above having to do with the rough and cruel treatment which he claims to have received.

Appellant argues that the deprogrammers' threats and actions for a week in trying to force him to give up his faith were as severe as any example of intentional infliction of emotional distress that the Second Restatement of Torts § 46 gives. Thus, there is one example in the Restatement involving the practical joker who falsely told his wife that her husband had been badly injured. This was shown in the Restatement as being outrageous conduct. Id., Comment d, illustration 1.

The trial court relied on Breeden v. League Services, Corp., 575 P.2d 1374 (Okla. 1978) as supporting his order directing the verdict on the issue of extreme conduct. The Breeden court held that a collection agent's conduct was not outrageous where he mailed three letters to the debtor's home and called her at work once. He attempted to reach her by phone several times. He spoke to her only once and used abusive language. However, it certainly is arguable that the conduct that was present in the Breeden case was far less abusive and excessive than the conduct here. Oklahoma law requires an initial determination that the conduct was extreme and outrageous before the court has to decide if the evidence supports a finding of severe emotional distress existed. The trial

court held that the case at bar did not get beyond the first hurdle. Appellees paint a picture of the deprogramming process as being therapeutic. They claim that it provided psychological help to Taylor to be exposed to a discussion of his religious beliefs. They maintain that all the actions were pursuant to court order. Their claim is that there was no intentional or reckless conduct on their part designed to inflict severe emotional distress. This course of conduct was just Taylor's parents acting through the appellees to cure their son.

The trial court directed a verdict against Taylor on the intentional infliction of emotional distress because he did not think that deprogramming per se was sufficient to constitute the outrageous conduct as required by

the case of Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978). The trial judge also said that he did not "think that the conduct of the defendants in carrying out their efforts, as shown by the evidence, constituted outrageous conduct." This loses sight of the fact that a trial court may direct a verdict only where the evidence and all the inferences from it are so clear that reasonable minds could not differ on the conclusion to be drawn. Taylor v. National Trailer Convoy, Inc., 433 F.2d 569, 571-72 (10th Cir. 1970). It is incumbent on the trial judge to view the evidence in the light most favorable to the non-moving party. Swearingen v. Sears, Roebuck & Co., 376 F.2d 637, 639 (10th Cir. 1967). All of the evidence on both sides of

the case ought to be considered in making this decision because eventually the court is going to have to pass on it and evaluate it. Christopherson v. Humphrey 366 F.2d 323, 325 (10th Cir. 1966). The court is not at liberty to disregard the evidence on behalf of the plaintiff in the case. The jury is entitled to weigh conflicting evidence and inferences and determine the credibility of witnesses. The court should accept as true the evidence of the non-moving party. Anderson v. Hudspeth Pine, Inc., 299 F.2d 874 (10th Cir. 1962).

Oklahoma has adopted § 46 of the Restatement of Torts which recognizes the tort of intentional infliction of emotional distress and it is for the trial court to determine whether the defendant's conduct is so extreme

and outrageous as to permit recovery. Where reasonable people may differ, the jury is to decide if the conduct "has been significantly extreme and outrageous to result in liability." The court must decide if severe emotional distress occurred. The Breeden court upheld a grant of summary judgment against the plaintiff where, as noted above, she had been harassed by a collection agency's letters and phone calls. This was not comparable to this case involving, as it does, kidnapping, imprisonment and severe harassment. Breeden is not comparable to the case at bar. The appellant was not only taken into custody by sheriff's officers and removed to the court, but he was also taken to Ohio for the purpose of this deprogramming effort. He was kept in a motel for over a week

while the deprogrammers did their worst to clear his mind of any desire to continue with his religion. They threatened to have the guardianship continue indefinitely and concomitantly to continue deprogramming him for as long as necessary. He was threatened with committment and beatings. He claims he suffered physical sickness during the time that he was being deprogrammed because of their actions and threats. His statements are not corroborated by any of the deprogramming team. Obviously they are not going to concede anything of that kind. His testimony is entitled to the weight of any other witness. His credibility is for the jury.

In Breeden the court said "the outrageous or extreme conduct required may arise from abuse of a position or

apparent authority over another." 575 P.2d at 1377. Here we have that factor. They had at least apparent authority over him and they may have believed, indeed they hoped, that their actions were under the protection of the court. They were taking advantage of the temporary guardianship order to alter his way of life by psychological shock treatment. This was a clear abuse of trust in addition to the excessive conduct.

The law on this intentional infliction of emotional distress is relatively meagre. In Reeves v. Melton, 518 P.2d 57 (Okla.Ct.App. 1974), the court held that an emotional distress claim was proper where the defendant terrorized the plaintiff over a disputed payment on a television. Testimony on behalf of the plaintiff was that the defendant

threatened to kill the dogs at her house and banged on all her doors and windows and lunged at the front door in an attempt to break in. In Bennett v. City National Bank and Trust Co., 549 P.2d 393 (Okla.Ct.App. 1976) a bank officer threatened to ruin a plaintiff's credit and made a series of threatening phone calls over a debt owed the bank of Bennett's son. Plaintiff suffered physical anxiety and distress because she had bought many items on credit and she was afraid defendant would carry out his threat. This was held to be sufficient to give rise to a claim for emotional distress.

In Munley v. ISC Financial House, Inc., 584 P.2d 1336 (Okla. 1978) the Breeden decision was followed. However, the defendant's behavior in Munley as

in Breeden was mild compared to that which was found in Bennett and Reeves. ISC Financial House was seeking to track down plaintiff's husband about a debt by coming to her home repeatedly to ask about Munley and by contacting plaintiff's neighbors and her former employer.

Finally, the value of the Breeden decision is solely for providing a test to judge the appropriateness of sending this claim to a jury. It is the facts of a case which dictates the application of this test. This count should have been submitted to the jury.

DID THE COURT ERR IN DISMISSING THE CLAIM WHICH AROSE UNDER 42 U.S.C. § 1983

The order dismissing the § 1983 claim must be affirmed. The color of law requirement which is part and parcel of § 1983, Adickes v. S.H. Kress & Co.,

398 U.S. 144, 150 (1970), is not satisfied under the facts of the case. It is impossible to say that the use of the court as part of the scheme, as occurred here in this case, is enough to constitute state action. The court was not a part of the conspiracy. At most the conspirators made use of the court in an effort to obtain some official appearance. The court allowed itself to be used without fully realizing the results which would follow.

In Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1326 (10th Cir. 1978) it was held that there was no state action involved in a suit between private litigants where the state merely furnishes the forum. In the Taylor case the complaint stems from the order of temporary guardian-

ship by the Oklahoma court. The judge is not a defendant, nor is any state officer, nor can it be said that the judge was a conspirator. Section 1983 just does not apply. See Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978).[3]

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3. We have examined the recent opinion of the United States Supreme Court in Lugar v. Edmondson Oil Co., 42 S.Ct.Bull. (CCH) B3884 (June 25, 1982). In Lugar, Justice White, speaking for five members of the Court, held that a § 1983 claim is made out when the deprivation of a federal right is attributable to the state. Such attribution can only be shown if 1) a deprivation is caused by the exercise of a right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible and 2) the party charged is a "state actor." One is said to be a state actor if one is a state official or a private person who acted together with or obtained significant aid from a state official or where there is conduct otherwise chargeable to the state.

The majority held that petitioner Lugar's claim that Virginia's prejudgment attachment statute was constitutionally defective fulfilled the "under color" of law requirement. A second due process count alleged that the state court denied Lugar procedural due process by its unlawful acts contrary to state law. The under-color-of-law language was not satisfied by this claim because, if true, respondent, Edmondson Oil, acted contrary to articulated state policy: "That respondent invoked the statute without the grounds to do so could in no way be attributed to a state rule or decision." Id. at B3903. Therefore, even though a private party's joint participation with state officials can label one as a state actor, a state court's action in violation of state law cannot be remedied by § 1983 where only a private party is charged.

THE CLAIMS UNDER 42 U.S.C. § 1985(2) and (3)[4]

In support of claims under subsections 2 and 3 of § 1985 plaintiff alleges that the defendants conspired to and did deprive him of the equal protection of the laws of the United States, including plaintiff's right to freedom of religion and association and his right not to be deprived of his liberty without due process, by the wrongful use of the judicial system and the sheriff's office in Oklahoma County, Oklahoma. The purpose of the conspiracy, according to the allegations, was to coerce plaintiff into changing his religious beliefs and

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3. (con't.) In the case before us, we do not read Taylor's complaint to allege that Oklahoma's guardianship statute is constitutionally defective. Rather, the gravamen here is that Judge Benson acted in contradiction to state

procedures. Under the recent ruling in Lugar our views on § 1983's applicability in this situation are unchanged. We note in passing that the majority limited Lugar to the factual situation where a pre-judgment attachment order is at issue. Id. at B3902 n. 21.

4. (2) [I]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws. . .;

(3) If two or more persons in any State or Territory conspire. . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;. . .in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

practices. Further allegations are that defendants conspired to impede, hinder, obstruct and defeat the course of justice in the state court of Oklahoma by obtaining an illegal temporary guardianship based on false representations, and in Arizona by maliciously filing redundant and superfluous guardianship proceedings based on false allegations that no guardianship proceedings were pending elsewhere. The trial court rejected the above-described claims, doing so by granting the defendants' motion for summary judgment. Both counts under § 1985(2) and under § 1985(3) were dismissed even though the court conceded that the plaintiff's allegations were within the broad language of both § 1985(2) and (3). The court concluded that there was a lack of power to reach the private

conspiracy so alleged. The district court determined that although Taylor's complaint described a cognizable claim under § 1985, there was a lack of congressional power to reach the type of injury or wrong that was alleged.

The parts of § 1985(2) and (3) relevant to this case derive from the original § 2 of the Civil Rights Act of 1871, 17 Stat. 13 (1871). See Kemble v. D.J. McDuffy, Inc., 648 F.2d 340, 344 & n.5 (5th Cir. 1981). For this reason, the same general analysis applies to the two sections. See Smith v. Yellow Freight Systems, Inc., 536 F.2d 1320, 1323 (10th Cir. 1976). Because there is a dearth of decisional law interpreting § 1985(2), our primary focus will be on § 1985(3).

What are the facts that are present here to support this theory? They are

alleged by the plaintiff in his complaint, namely his right to freedom of religion and association, and his right not to be deprived of his liberty under due process of law by the wrongful use of the judicial system and the sheriff's office in Oklahoma County, Oklahoma.

It will be recalled that the defendants approached a state district judge who was temporarily serving in Oklahoma City and that judge upon being told of the problem authorized the issuance of an order to bring the plaintiff into court. Officers from the sheriff's department were employed to execute the order. Thereupon a hearing was held in the district court even though there was no statute provided for hearing under these circumstances, that is to say where the individual involved, the plaintiff,

had not committed a crime or was not shown to be insane. Nevertheless the judge fashioned a remedy to cover the situation. He brought the plaintiff, Taylor, in and conducted a hearing and following that hearing delivered Taylor into the custody of the defendants in order for them to work their magic on him to deprogram him. A further allegation is that the defendants conspired to obstruct and impede the due course of justice in the state court by obtaining an illegal temporary guardianship based on false representations and doing somewhat the same thing in Arizona.

Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971) sets forth the requirements that must be met by a plaintiff seeking to state a claim under § 1985(3):

> To come within the legislation a complaint must allege that the defendants did (1) 'conspire or

> go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (d) did, or caused to be done, 'any act in furtherance of the object of [the] conspiracy,' whereby another person was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'

All of the first, third and fourth elements are clearly present and the trial court so found. If some of the defendants were not members of the conspiracy, then that is a matter that should be decided by the jury at the trial. Certainly they joined in the action that took place and many acts were done in furtherance of the alleged conspiracy, including the obtaining of the guardianship and

the conducting of the deprogramming. Plaintiff's allegation of injuries surely satisfies the fourth element. The issue is whether the second element quoted above is established. This requires a purpose to deprive any person of the equal protection of the laws, or of equal privileges and immunities under the laws. Griffin construed it as having two parts: a "racial, or perhaps otherwise class-based, invidiously discriminatory animus," which "aim[s] at a deprivation of the equal enjoyment of rights secured by the law to all." 403 U.S. at 102.

Is there a class-based invidious discrimination under the meaning of the Griffin decision? It should be emphasized that these defendants are professionals. They perform this service

for money and they spend a significant amount of time on it. The record shows that and certainly their conduct is odious and has the effect of depriving the victim of important rights - his liberty, his freedom, his right to practice his religion, among other rights.

The Court in Griffin did not hold that only a racial bias would satisfy the requirement of class-based invidious discrimination. 403 U.S. at 102, n. 9. Justice Stewart left this question open. In Silkwood v. Kerr-McGee, 637 F.2d 743, 748 (10th Cir. 1980), we noted that the legislative history of the 1971 Civil Rights Act, the source of § 1985(3), contains an explanation by Senator Edmunds of the type of conspiracies to be remedied by the Act:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter,. . .then this section could reach it.

Cong. Globe, 42d Congress, 1st. Sess. 567 (1871) (emphasis added). Such language clearly encompasses an "irrational and odious class discrimination based on national origin or religion." Arnold v. Tiffany, 359 F.Supp. 1034, 1036 (D.C. Cal.), aff'd on other grounds, 407 F.2d 216, 218 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974).

In the present case the trial court concluded:

> [A] fair and reasonable reading of plaintiff's complaint demonstrates that the defendants singled out plaintiff because of his status as a member of the Old Catholic Church, and not because of his individual beliefs. In other words, this class status is not created by the mere fact that plaintiff possesses the right to freedom of religion, as do all persons, but rather by the fact that he is a member of a fringe or minority religious group. It is the defendants' abhorrence of that group that motivates them to de-program individuals such as plaintiff.

The record before the court at the time of the summary judgment motions bears out is conclusion. The record certainly supports the statement of the trial judge immediately above. As an example, in its application for an exemption under the Internal Revenue Code, the Freedom of Thought Foundation responded to a question regarding its area of public interest or concern: "The illegal and immoral techniques used

by so-called Religious Cults to induce mind control and brainwashing of young adults. . ." Dep. of Michael E. Trauscht, Ex. 3.

Other courts have reached a similar conclusion. See Baer v. Baer, 450 F.Supp. 481 (N.D.Cal. 1978), 491. See also Ward v. Connor, 657 F.2d 45, 47-48 (4th Cir. 1981); Rankin v. Howard, 457 F.Supp. 70, 74 (D. Ariz. 1978); but see Weiss v. Patrick, 453 F.Supp. 717, 723-24 (D.R.I. 1978).

We conclude as did the trial court that there is adequate evidence of the type of class-based, invidiously discriminatory animus envisioned in Griffin to overcome a motion for summary judgment. Whether the defendants were in fact motivated by the alleged animus against religious minorities is, of

course, a question for the jury.

In Griffin, Justice Stewart, speaking for the Court, held that the absence from § 1985(3) of the phrase "under color of any statute, ordinance, regulation, custom or usaege, of any state. . ." which is present in § 1983 distinguished these two statutes so that § 1985(3) circumscribed private conspiracies. Once this determination was made, the Court then examined Congress' power to constitutionally reach such private conspiracies. Two sources were found: § 2 of the thirteenth amendment, and the right of every citizen to travel interstate. See 403 U.S. at 104-06. No issue exists in this case of race discrimination prohibited by the thirteeneth amendment. Furthemore plaintiff did not allege in his complaint that an object of defendants'

conspiracy was to deprive him of his right to travel interstate. He now urges this as a basis to uphold his claim under § 1985(3). However, the facts do not lend themselves to a claim of interference with this right.

Because appellant's complaint has alleged conduct violative of his first amendment right to freely practice his religion and his right to unhindered associations, as well as equal protection and due process claims, we must look to the fourteenth amendment as the applicable source of power here to reach the conspiracy alleged. While the suit before us alleges a private conspiracy in the sense that the named defendants -- those who transported and sought to deprogram the plaintiff -- are not state officers, nevertheless, there is no dearth of

state involvement as a result of the cooperation of the judges and the sheriff's officers.

The lower court characterized the § 1985 complaint as seeking a remedy for a purely private interference with fourteenth amendment rights. It has been traditionally viewed that the fourteenth amendment provides no protection against private action. District of Columbia v. Carter, 409 O.S. 418, 423 (1973); Shelley v. Kraemer, 334 U.S. 1, 13 (1948). We, of course, adhere to the Court's dictates in this area.

In the case at bar, however, the allegations extend beyond the private deprivation of constitutional rights. The contention is that the defendants formed a conspiracy to cause the state to participate and deprive the plaintiff

of his liberty without due process and to interfere with his first amendment freedom of association and religion due to their hatred of minority religions. If these allegations are true, then they may indeed be remedied by § 1985 (2) or (3).

It is our position that the district court was wrong in reaching the conclusion which it reached. We believe that § 5 of the fourteenth amendment is the source of congressional power. This is the provision which authorizes Congress to provide a remedy where private parties conspire to induce the state to deprive an individual of his constitutional rights. Section 5 of the fourteenth amendment provides: "The Congress shall have the power to enforce by appropriate legislation the provisions of this article." The fourteenth

amendment prohibits any state from depriving an individual of life, liberty, or property without due process of law, or from depriving an individual of the equal protection of the laws. Katzenbach v. Morgan, 384, U.S. 641, 650 (1966), held that § 5 of the fourteenth amendment was intended to grant to Congress the same broad powers to enforce the fourteenth amendment as are expressed in the Necessary and Proper Clause of Article I, section 8, clause 18 of the Constitution. It is this broad authority which gives to Congress the power, exercised in § 1985(2) and (3), to provide a remedy against conspiracies whose object is to cause the state to deprive an individual of his first and fourteenth amendment

rights.[5]

5. A number of commentaries support this conclusion. See. e.g., Comment, A Construction of Section 1985(c) in Light of Its Original Purpose, 46 U. Chi.L.Rev. 402, 432, 436 (1979); Wildman, 42 U.S.C. § 1985(3) -- A private Action to Vindicate Fourteenth Amendment Rights: A Paradox Resolved, 17 San Diego L.Rev. 371 (198); Cox, Foreward: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv.L.Rev. 91, 102 (1966).

6. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured --

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

As we view it, our position here is in accord with the position that was taken by six Justices of the Supreme Court in United States v. Guest, 383 U.S. 745 (1966). In that case, six defendants were indicted in Georgia for ciminal conspiracy violative of 18 U.S.C. § 241 [6]. This is the remaining criminal counterpart of § 1985 [7]. The defendants were accused of conspiring to deprive black citizens of the right to equal

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7. The criminal analogue to § 1985(3), § 5519 of the Revised Statutes (Act of April 20, 1871, ch. 22, § 2, 17 Stat. 13, repealed, Act of March 4, 1909, ch. 15, 35 Stat. 1153), was held to be unconstitutional in United States v. Harris, 106 U.S. 629, 639 (1882). The Court interpreted § 5519's reach to encompass private conspiracies to violate the fourteenth amendment. Harris struck down the statute because of an overly narrow view of the severability of statutes that were only partially constitutionally deficient.

utilization of public facilities owned and operated by the State of Georgia by causing their arrest through false reports or criminal acts. The court held that the indictment contained sufficient allegations of state cooperation in the means of accomplishing the object of the conspiracy to preclude dismissal of the indictment. Id. at 756.

There was a separate concurrence of Justice Clark, joined by Black and Fortas, which stated:

> The Court carves out of its opinion the question of the power of Congress, under § 5 of the Fourteenth amendment, to enact legislation implementing the Equal Protection Clause or any other provision of the Fourteenth amendment. . . . [T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspirators -- with or without state action -- that interfere with fourteenth amendment rights.

Id. at 762 (emphasis added). Justice Brennan wrote a separate opinion which was joined in by Chief Justice Warren and Justice Douglas. Brennan's view was that the Court was requiring active connivance by agents of the state in order for there to be a violation of 18 U.S.C. § 241:

> I cannot agree with that construction of § 241. I am of the opinion that a conspiracy to interfere with the right to equal utilization of state facilities described in the second numbered paragraph of the indictment

> is a conspiracy to interfere with a 'right. . .secured. . . by the Constitution' within the meaning of § 241 -- without regard to whether state officers participated in the alleged conspiracy. I believe that § 241 reaches such a private conspiracy, not because the fourteenth amendment of its own force prohibits such a conspiracy, but because § 241, as an exercise of congressional power under § 5 of that amendment, prohibits all conspiracies to interfere with the exercise of a 'right. . . secured. . .by the Constitution' and because the right to equal utilization of state facilities is a 'right. . .secured. . .by the Constitution' within the meaning of that phrase as used in § 241.

Id. at 777 (footnote omitted) (emphasis in original).

The inference to be drawn is that the six Justices in United States v. Guest, supra, adopted the position that a private conspiracy which interferes with fourteenth amendment rights by pre-

venting the state from granting equal treatment or by causing the state to deprive a citizen of his constitutional rights is sufficient state action within the power of Congress to remedy under § 5 of the fourteenth amendment, notwithstanding the state is not actually one of the conspirators.

Justice Stewart's majority view in Guest is also analogous to the case before us. The majority was able to avoid deciding whether Congress under § 5 of the fourteenth amendment could reach a private conspiracy to violate the rights or privileges secured by the Constitution or federal laws because Justice Stewart found sufficient state involvement alleged in the indictment. The defendants were said to have induced the arrest of blacks through false reports that

these blacks had committed criminal acts. 383 U.S. at 756.

This analysis is fully applicable to the case at bar. The activity here in effect brought the state into a position which was tainted. The purpose was not to help Taylor, the allegedly sick man, by treating him or showing concern for him, but rather to participate in coercing a change in this adult's religious beliefs and it was but a prelude to what was to happen. If, as Mr. Justice Stewart said in United States v. Guest, supra, that some limited state involvement may suffice, it clearly follows that the extensive state involvement in this case would

certainly satisfy a necessary requirement.[8]

In his separate concurrence in Great American Savings & Loan Ass'n., 442 U.S. at 383-84, Justice Stevens expressed a view consistent with such a conclusion when he said:

> Some privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action as well as impairment by state action. Private conspiracies to deprive individuals of these rights are, as this Court held in Griffin v. Breckenridge, 403 U.S. 88, 29 L.Ed.2d 338, 91 S.Ct. 1790, actionable under § 1985(c) without regard to any state involvement.

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8. The state's position in this kind of a situation is nicely summed up in a note, The Scope of Section 1985(3) Since Griffin v. Breckenridge, 45 Geo.Wash.L.Rev. 239, 250, n. 90 (1977). There it was said "the state is not the generator of the wrong perpetrated but is the mechanism used to carry it out."

> Other privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action. Shelley v. Kraemer, 334 U.S. 1, 13, 92 L.Ed. 1161, 68 S.Ct. 386, 3 A.L.R.2d 441. If a state agency arbitrarily refuses to serve a class of persons -- Chinese Americans, for example, see Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 -- it violates the fourteenth amendment. Or if private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the fourteenth amendment; the private persons would then have violated § 1985(c). (footnotes omitted) (emphasis added).

It is true that although the appellant does not claim that the state conspired to deprive him of his constitutional right, he does claim that the state unwittingly deprived him of those rights when

the sheriff's deputies forced Taylor to appear before Judge Benson under no apparent statutory authority and when the state court appointed his father temporary guardian without any jurisdiction, whereby he was illegally delivered over to the defendants and was deprived of his freedom of association and his freedom to pursue his religious beliefs. We must hold that a private conspiracy, if this be such, motivated by a class-based, invidiously discriminatory animus, to induce the state to violate one's first and fourteenth amendment rights is remedied by § 1985(2) and (3).[9] The

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9. It should be clear from our holding on § 1983 in this decision that the defendants' use of the state court to attain what may prove to be unconstitutional goals is not tantamount to action under "color of law" as defined by § 1983.

participation and contribution of the state officers was a considerable factor in the ultimate activities of these defendants.

THE CONNECTED MATTERS

The appellant raises a number of alleged errors contending that there was abuse of discretion by the trial court. We do not consider any of these.

The appellees Howard and Trauscht have contended that the covenant not to sue Dr. Taylor and his wife that was signed by appellant Taylor should prevent this suit. They claim that under the doctrine of Barsh v. Mullins, 338 P.2d 845 (Okla. 1959) this covenant not to sue releases them because they are non-acting conspirators whose only liability could arise under respondent superior. Dr. Taylor, they say, is the

only active conspirator; that he initiated the petition for guardianship and, since he is no longer a party, they cannot be held liable. We disagree with all of this. First, the Barsh case does not apply. These appelles are not non-acting conspirators. Their liability, if it is established, results from active participation in securing the guardianship order and in removing Taylor to Akron and then participating in the actual deprogramming. These are professionals, it should be remembered. They do this for pay. These men had contracted with Taylor to bring appellant home free of any cult influence. They signed a retainer agreement and a consultant agreement for substantial monetary considerations and received a large amount of money. The Barsh v. Mullins case is not applicable whatso-

ever. In Barsh, the plaintiff claimed that defendants Ray Barsh Truck Lines and Ken Glass were liable in a civil conspiracy which occurred following a wrongful death in an auto accident. The active participants, Hall, a truck driver who collided with decedent, and his employer Barsh Produce were released from liability by the administrator of decedent's estate. The remaining defendants were non-actors and their only liability was through the use of respondent superior. Howard and Trauscht attempt to rely on the statement by the Barsh court that when conspirators are to be held liable for the acts of co-conspirators when the object of the conspiracy is not to damage anyone, such liability is based on the principal-agent theory. The release

of those primarily negligent releases the other conspirators. Unlike Ken Glass and Barsh Produce, Howard and Trauscht were active conspirators.

Two other distinctions deserve mention. No release of Dr. Taylor and his wife is present in the covenant not to sue. One who covenants not to sue does not surrender his action, but merely agrees not to enforce it. Under Oklahoma law a covenant not to sue in favor of one joint tort-feasor does not release others unless it was so intended. Allen v. Ouachita Marine and Industry Corp., 606 P.2d 607, 609 (Okla.Ct.App. 1980). Another difference between Barsh and the instant case is the presence of the issue of intent to damage by the unreleased co-conspirators. Barsh held that the lack of intent to damage the plaintiff was essential to extinguishing

any action against the non-covenanting conspirators. While, from the standpoint of Howard and Trauscht, no damage to Taylor may have been intended, their concept of their motives may not be accepted by this court. The participation of Howard and Trauscht in obtaining this void court order and the deprogramming demonstrates their involvement in the tortious conduct. For these reasons their argument for release through covenant not to sue must be rejected.

CONCLUSION

One previously mentioned item which must be emphasized is the appellees' attempted use of these insanity statutes in an effort to develop an immunity defense in which an adult person who does not show any

evidences of insanity is subjected to excessive conduct. This is a misuse of the state insanity-guardianship or conservatorship statutes having a clear purpose to get some kind of court protection of deprogramming. This should not be allowed. In Katz v. Superior Court, 73 Cal.App. 3d 952, 141 Cal.Rptr. 234 (Ct.App. 1977) the intermediate appellate court rejected the use of the California probate code's conservatorship statute against five adult children who were involved in a cult religion. The statute was said to be too vague to justify the appointment of a temporary conservator, and the appointment violated the free exercise rights of the adults. No evidence at the hearing demonstrated the appellants were unable to care for themselves. The phrase in § 1751 of the California Probate Code "likely

to be deceived or imposed upon by artful or designing persons" was held to be unconstitutionally vague when applied to religious beliefs. 141 Cal.Rptr. at 244. Similar language has been used by Oklahoma courts to interpret Title 55, § 852. The court in Katz took a strong stand against licensing kidnapping for the purpose of thought control. Id. at 253. Its sentiments are shown by the following: "in the absence of such actions as render the adult believer himself gravely disabled. . ., the process of this state cannot be used to deprive the believer of his freedom of action and to subject him to involuntary treatment." Id. at 256. In the case before us the exposure of Taylor to the monastery did not have any adverse effects upon him whereby he was gravely disabled.

Had there been some evidence to show that the religion in suit here was fraudulent or immoral or illegal, although we are not prepared to say what the effect would be, at least the appellees would have some equity to go on. But in this case they are not even dealing with a helpless child. They are dealing with a person whose resolve is shown by the failure of the deprogramming effort and who escaped back to the monastery as quickly as he could. Taylor lived at the monastery before the deprogramming attempt and was still living there at the time of trial, over four years later. So, therefore, this is a situation in which there is a gross concerted interference with a very fundamental right, the right to choose one's religion, and it is the underlying factor that makes the case

actionable, or which greatly aggravates it.

The judgment of the district court should be and the same is affirmed in part and reversed in part. We have affirmed the judgment in the § 1983 claim, and we reject the interference with the right of travel claim advanced on appeal. In examining the allegations pertaining to each named defendant we note that no showing was made below of Dr. Gilmartin's involvement in the false imprisonment claim or in the infliction of emotional distress charge. Therefore as to those two tort claims summary judgment in Gilmartin's favor is affirmed. Judgment in favor of all other defendants on these two tort claims is reversed. Judgment on the claims under § 1985(2) and (3) are reversed as to all defendants.

The case shall be remanded for further proceedings, a new trial to a jury, in accordance with the foregoing.

IN THE UNITED STATES DISTRCIT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

WALTER ROBERT TAYLOR,	)	
	)	
Plaintiff	)	
	)	
vs	)	
	)	NO.
KEVIN M. GILMARTIN,	)	
MICHAEL E. TRAUSCHT,	)	CIV-77-9351-D
WAYNE N. HOWARD,	)	
FREEDOM OF THOUGHT	)	
FOUNDATION, INC.,	)	
JOSEPH ALEXANDER,	)	
ESTHER ALEXANDER,	)	
GARY SCHARFF,	)	
WALTER WINSTON TAYLOR,	)	
SYLVIA TAYLOR,	)	
DAVID TAYLOR, and DOES	)	
I THROUGH X,	)	
	)	
Defendants.	)	

O R D E R

This is an action for compensatory and punitive damages brought by Plaintiff Walter Robert Taylor against the above-named Defendants alleging a conspiracy to violate his civil rights un-er 42 U.S.C. §§1983, 1958(2), 1985(3) and 1986, together with pendent

claims for conspiracy to commit medical malpractice, legal malpractice, intentional infliction of emotional distress, conspiracy to falsely imprison and conspiracy to commit assault and battery. It is asserted that this Court has jurisdiction of the action pursuant to 28 U.S.C. §1331 (federal question), §1332 (diversity of citizenship) and §1343 (civil rights).

The matter is now before the Court on combined motions to dismiss and motions for summary judgment filed by Defendants Howard and Trauscht, Freedom of Thought Foundation, Inc. (Foundation) and the Taylors. In their motions said Defendants contend that Plaintiff's complaint fails to allege facts sufficient to constitute causes of action in his favor against the Defendants. In the alternative they

seek a summary judgment in their favor on the basis that the record in this case shows that there is no genuine issue as to any material fact and that they are entitled to a judgment as a matter of law.

The moving parties have submitted briefs, affidavits and exhibits in support of their motions. Plaintiff has responded, with supporting briefs, affidavits and exhibits, to said motions. The Court has conducted a hearing on the motions.

Rule 12(b), Federal Rules of Civil Procedure, provides that if, on a motion to dismiss for failure to state a claim,

> matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall

> be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

When, as in this case, matters outside the pleadings are presented in connection with a motion to dismiss for failure to state a claim, and the same are not excluded by the Court, the Court must treat the motion as one for summary judgment and proceed under Rule 56. Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972) (per curiam); Franklin v. Oklahoma City Abstract & Title Co., 584 F.2d 964, 967 (Tenth Cir. 1978); American Home Assurance Co. v. Cessna Aircraft Co., 551 F.2d 804, 807 (Tenth Cir. 1977); Torres v. First State Bank, 550 F.2d 1255, 1257 (Tenth Cir. 1977).

In the instant case the Court has conducted a hearing on the Defendants' motions for summary judgment; pursuant to Rule 56(c), notice was given to the Plaintiff and all parties were given a reasonable opportunity to present all material made pertinent to the Defendants' motions by Rule 56.

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c). Such a motion should be granted only when the moving party has established the absence of any genuine issue as to a material fact and that it is entitled to judgment as a matter of law.

Williams Petroleum Co. v. Midland Cooperatives, Inc., 539 F.2d 694, 697 (Tenth Cir. 1976); Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168, 171 (Tenth Cir. 1974). The Court must examine the summary judgment papers in the light most favorable to the party opposing the motion. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Mogle v. Sevier County School District, 540 F.2d 478, 482 (Tenth Cir. 1976), cert. denied, 429 U.S. 1121, 97 S.Ct. 1157, 51 L.Ed.2d 572 (1977); Webb v. Allstate Life Insurance Co., 537 F.2d 336, 340 (Tenth Cir. 1976).

This action arises from the Defendants' attempted religious deprogramming[1/] of Plaintiff, a priest of the Old Catholic Church

and a resident of the monastery of the Holy Protection of the Blessed Virgin Mary in Oklahoma City, Oklahoma. Plaintiff names as defendants herein his parents, brother, the Foundation and other participants in the deprogramming.

Plaintiff alleges that in June, 1976 his parents entered into an agreement with the Foundation, a corporation engaged in the business of deprogramming, whereby the Foundation was to deprogram the Plaintiff. Proceedings were instituted in the Oklahoma County District Court

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1/ Deprogramming, as the term has become known, is the process whereby individuals who are members of certain religious groups are subjected to a scheme of brain-washing or mind control in an attempt to dissuade them of their religious beliefs. Baer v. Baer, 450 F.Supp. 481, 458 (N.D. Cal. 1978).

seeking to have Plaintiff's father, Dr. Walter Winston Taylor, appointed as temporary guardian for the Plaintiff. At the direction of the state district court, local law enforcement officers seized Plaintiff at the monastery and brought him before the court. The court conducted a hearing and appointed Dr. Taylor as Plaintiff's temporary guardian. Plaintiff was then taken to Ohio, where the attempted deprogramming process began, and later to Arizona, where the deprogramming continued. While Plaintiff was in Arizona, another judge of the Oklahoma County District Court entered an order revoking the earlier order which appointed Dr. Taylor as Plaintiff's temporary guardian. In the later order the Taylors and the deprogrammers were directed to stop the deprogramming process

and return Plaintiff to Oklahoma City. At this point, the Taylors instituted guardianship proceedings in a state court of Arizona, where Dr. Taylor was again appointed as Plaintiff's temporary guardian. Plaintiff ultimately escaped from the custody of the deprogrammers and returned to his monastery in Oklahoma City on August 1, 1976.

Plaintiff brings this action asserting seven causes of action against the Defendants: first, for conspiracy to violate his civil rights, pursuant to 42 U.S.C. §§183 and 1985(3); second, conspiracy to obstruct justice, pursuant to 42 U.S.C. §1985(2); third, conspiracy to commit medical malpractice; fourth, legal malpractice; fifth, intentional infliction of emotional distress; sixth, conspiracy to falsely imprison; and

seventh, conspiracy to commit assault and battery. In ruling on the motions now pending, the Court will consider each of Plaintiff's causes of action separately.[2/]

CONSPIRACY TO VIOLATE CIVIL RIGHTS

In his first cause of action, Plaintiff alleges that the Defendants conspired to deprive him of the equal protection of the laws with regard to his rights to tolerance of religious sentiment, no transporation out of state without due process, impartial trial, due process, freedom of religion and

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2/ In their motions the moving parties do not address Plaintiff's second cause of action, wherein Plaintiff proceeds under 42 U.S.C. §1985(2) alleging that the Defendants conspired to obstruct justice. Accordingly, the Court will not consider that cause of action in this Order.

speech and association, against unreasonable search and seizure, to liberty and due process, against cruel and unusual punishment, privacy, and to pursue a lawful occupation and reside in any state unmolested. He asserts that these rights are guaranteed to him by state law and by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments.

The moving parties move to dismiss this cause of action on the basis that Plaintiff has failed to state a claim upon which relief can be granted under either 42 U.S.C. §1983, §1985(3) or §1986.[3/] They contend that

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3/ Although the moving parties attack Plaintiff's claim herein under §1986, Plaintiff indicates in his response to the motion of Howard and Trauscht that he is not attempting to plead a §1986 claim in this action.

Plaintiff's claim for relief under §183 must fail because there is no evidence in the record to establish a conspiracy among the Defendants to deprive Plaintiff of his constitutional rights and that the actions of the Defendants were not under color of state law. They assert that the § 1985(3) claim must fail because of a lack of a "class-based animus."

In addition, Defendants Howard and Trauscht maintain that Dr. Taylor, as the temporary guardian of Plaintiff appointed by the state court, should be granted the same immunity as would be afforded the state court judge entering such order. The Foundation further contends that the evidence in this case establishes that it was not

involved in the conduct complained of by Plaintiff and, moreover, that it was not in operation until after the alleged actions took place. The Taylors further argue that the record herein clearly establishes the legality and validity of Dr. Taylor's temporary guardianship order and that this makes the other questions moot.

PLAINTIFF'S CLAIM FOR RELIEF UNDER 42 U.S.C. §1983

To frame a cause of action under §1983 [4/] the Plaintiff must allege facts which show the Defendants have acted

4/ This section provides:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

under color of state law or authority and have deprived the Plaintiff of a right, privilege or immunity secured by the Constitution and the laws of the United States. Adickes v. S.H. Kress & Co., supra, 398 U.S. at 150; Palacios v. Foltz, 441 F.2d 1196, 1197 (Tenth Cir. 1971); Jones v. Oklahoma Secondary School Activities Association, 453 F.Supp. 150, 155 (W.D. Okla. 1977); Black v. Cook, 444 F.Supp. 61, 63 (W.D. Okla. 1977); Harbert v. Rapp, 415 F.Supp. 83, 86 (W.D. Okla. 1976).

§1983 is of limited scope, dealing only with those deprivations of rights which are accomplished under the color of the law of a state or territory; it does not reach purely private conduct. District of Columbia v. Carter, 409 U.S. 418, 424, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973). However, to act "under

color" of law does not require that the accused be an officer of the state; it is enough that he is a willful participant in joint activity with the state or its agents. United States v. Price, 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), quoted and relied upon in Adickes v. S.H. Kress & Co., supra, 398 U.S. at 152.

In a case very similar to the instant case, the United States District Court for the Northern District of California indicated:

> Where the defendants are private individuals, as in the case at hand, two ways exist in which their otherwise private conduct may become state action within the meaning of §1983. In the first circumstance, courts deem private individuals to be clothed with the authority of the state when it is apparent their actions are substantially identical to actions taken by the state. See, e.g., DeCarlo v. Joseph Horne & Co., 251 F.Supp. 935 (W.D.Pa.1966). As one court

observed:

> The key feature of this type of liability is that the individual possesses power, conferred by state or otherwise, which the ordinary citizen does not possess and which allows the individual to take actions normally associated with those taken by public officials acting on behalf of the state. Dennis v. Hein, 413 F.Supp. 1137, 1140 (D.S.C.1976). See also Oller v. Bank of America, 342 F.Supp. at 23.

More often, private action is deemed state action because the individual wilfully participates in joint activity with the state or its agents. See, e.g., Adickes v. S.H. Kress and Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959). The test of whether a joint participation or conspiracy exists is whether the facts alleged demonstrates that the private individual and the public official acted with a common understanding or "meeting of the minds" to deprive the plaintiff of his constitutionally protected rights. 398 U.S. at 156, 90 S.Ct. 1598. See Hoffman v. Halden, 268 F.2d at 294. . .As this court observed

> in Oller v. Bank of America, 342 F.Supp. at 23, however, '[t]he requirement of "State action' can rarely be satisfied when the action is taken by one not a state official.'

Baer v. Baer, 450 F.Supp. 481, 485-86 (N.D. Calif. 1978).

In this case Plaintiff contends that the Defendants' actions were done under color of the law of Oklahoma through the Defendants' use of the state judicial system, state court orders and local law enforcement officers to effectuate the deprogramming process. He maintains that Dr. Taylor, one of the conspirators, was clothed with the authority of the state in the form of the temporary guardianship order and that the Defendants misused that authority by causing Plaintiff to be abducted by local law enforcement officers and by incarcerating Plaintiff during the

attempted deprogramming. Plaintiff asserts that when Dr. Taylor was appointed as Plaintiff's temporary guardian, he became a state actor, and that when the deprogrammers utilized the temporary guardianship order to abduct Plaintiff with the assistance of local law enforcement officers and to incarcerate him during the programming, the deprogrammers were exercising state power rather than a private remedy.

In two cases involving religious deprogramming, both with virtually identical facts to the instant case, federal district courts in California and Arkansas have determined that a state, merely by providing a forum and a means of enforcing regularly issued court orders, does not "color" the action of the private litigants with

state action. See Baer v. Baer, supra; Orlando v. Wizel, 443 F.Supp. 744, 748 (W.D. Ark. 1978).

The Court agrees with the conclusions reached in those decisions and finds herein that the Defendants' private conduct giving rise to this action did not constitute state action within the meaning of §1983.

The Defendants' resort to the state court to obtain the temporary guardianship order, and the subsequent utilization of local law enforcement officers to obtain custody of Plaintiff, did not clothe the Defendants with the authority of the state. Such disinterested and indirect involvement by the state is too insignificant to bring the alleged discrimination within the pale of constitutional prohibitions. Baer v.

Baer, supra, 450 F.Supp. at 486. As noted in Baer:

> Because the courts are open to all persons the state confers no power upon any one individual that another does not possess. Defendants here did not possess any special aura of state authority because their actions were not those normally taken by public officials acting on behalf of the state. In petitioning the. . .[court] for an ex parte conservatorship order defendants were exercising a power not conferred by statute upon a select few but upon all citizens of the state.

Id. 450 F.Supp. at 486.

The Court finds Plaintiff's contention that the Defendants acted under color of state law in this case due to their misuse of power with the cloak of state authority to be misplaced. Any private misuse by the Defendants of the Oklahoma law does not present a claim upon which relief could be granted under §1983. See Baer v. Baer, supra,

450 F.Supp. at 487.

Nor does the Court find persuasive Plaintiff's reliance on the joint participation method of establishing that the Defendants acted under color of state law. Plaintiff's Complaint fails to state sufficient facts to establish that the state officials participated in the wrongful conduct with the shared intention of depriving Plaintiff of his constitutional rights. There is no allegation in the Complaint nor any evidence in the record that either the state court judge that issued the temporary guardianship order or the local law enforcement officers who effectuated that order were a part of the purported conspiracy between the Defendants to deprive Plaintiff of his rights. Neither is there any allegation or evidence that those

state officials shared this goal. The record shows only that the state court issued the order upon application of Dr. Taylor, a private citizen, and that the local law enforcement officers assisted in carrying out the court order. This is insufficient to establish that the Defendants and those state officials jointly participated to deprive Plaintiff of this constitutional rights.

Accordingly, the Court finds that Plaintiff's Complaint fails to state a claim under §1983 as it fails to allege action under color of state law. Defendants are entitled to judgment in their favor dismissing Plaintiff's §1983 claim.

PLAINTIFF'S CLAIM FOR RELIEF UNDER 42 U.S.C. §1985(3)

The moving parties' next attack is mounted against Plaintiff's

§1985(3) claim in his first cause of action. The moving parties assert that there is not sufficient evidence in this case to establish a "class-based animus" to support an action under that section.[5] They argue that Plaintiff has made no showing that other individuals have not been the subject of guardianship proceedings

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[5] §1985(3) provides in pertinent part:

> If two or more persons in any State or Territory conspire. . .for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privilege and immunities under the laws. . . [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy . . .the party so injured or deprived may have an action for the recovery of damages. . .against any one or more of the conspirators.

under similar circumstances, or that individuals who are members of religious groups other than the Old Catholic Church have not been the object of guardianship proceedings. They further maintain that the Taylors' use of the state courts of Oklahoma and Arizona with regard to the guardianship proceedings does not create the necessary state involvement so as to give rise to a §1985(3) action.

In opposition to the motions, Plaintiff contends that his Complaint states a claim upon which relief can be granted under §1985(3) as the Defendants herein have demonstrated a class-based animus by singling out minority religions as the target of their deprogramming attempts. He asserts that a state action is not an essential

element to a §1985(3) claim, citing Taylor v. Nichols, 558 F.2d 561, 567 (Tenth Cir. 1977).

In order to recover damages for a conspiracy to violate his civil rights, Plaintiff must allege and prove a violation of §1985(3).

The Supreme Court has construed a cause of action under that section as follows:

> To come within the legislation a complaint must allege that the defendants did (1) 'conspire or go in disguise on the highway or on the premises of another' (2) 'for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.' It must then assert that one or more of the conspirators (3) did, or caused to be done, 'any act in furtherance of the object of [the] conspiracy, 'whereby another was (4a) 'injured in his person or property' or (4b) 'deprived of having and exercising any right or privilege of a citizen of the United States.'

Griffin v. Breckenridge, 403 U.S. 88, 102-03, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

The Supreme Court in Griffin performed a two-level analysis of the complaint in order to determine whether a cause of action under §1985(3) had been stated. It considered, first, whether the facts alleged in the complaint before it fell within the terms of §1985(3). Secondly, recognizing that conduct within the terms of the statute might go beyond the power of Congress to regulate, the Court identified the source of congressional power to reach the conduct alleged.

In this case, the Court concludes that Plaintiff's Complaint satisfies the first of the aforementioned requirements, in that the facts alleged in the Complaint fall within the terms of §1985(3).

However, the Court finds that Plaintiff's §1985(3) claim must fail as the Court is unable to determine that Congress has the power to reach the private conspiracy involved in this case.

In determining that the conspiracy alleged in Plaintiff's first cause of action falls within the terms of §1985(3), the Court disagrees with the Defendants' contention that Plaintiff has failed to allege sufficient facts to establish a class-based animus for purposes of §1985(3). It would appear that the religious followers of the Old Catholic Church may constitute a class within the meaning of that section. See e.g., Murphy v. Mount Carmel High School, 543 F.2d 1189, 1192 n. 1 (Seventh Cir. 1976); Baer v. Baer, supra, 450 F.Supp. at

491. And a fair and reasonable reading of Plaintiff's Complaint demonstrates that the Defendants singled out Plaintiff because of his status as a member of the Old Catholic Church, and not because of his individual beliefs. In other words, this class status is not created by the mere fact that Plaintiff possesses the right to freedom of religion, as do all persons, but rather by the fact that he is a member of a fringe or minority religious group. It is the Defendants' abhorrence of that group that motivates them to deprogram individuals such as Plaintiff. As stated in Baer:

> While religious status may differ from racial status because it is not a congenital and inalterable trait, membership in a minority religious group, like membership in a minority racial group, has often excited the fear, hatred and irrationality of the majority.

> Two thousand years of human history compellingly prove that no easier road to martyrdom is found than in adherence to an unpopular religious faith. For these reasons, and because the legislative history does not indicate otherwise, this court concludes that religious discrimination may be encompassed by the terms of §1985(3).

Baer v. Baer, supra, 450 F.Supp. at 491. But see Weiss v. Patrick, 453 F.Supp. 717, 723-24 (D.R.I. 1978).

It is also clear that §1985(3) permits actions against private persons for conspiracies which involve no state action. E.g., Griffin v. Breckenridge, supra, 403 U.S. at 101; Taylor v. Nichols, supra, 559 F.2d at 567.

The Court therefore concludes that Plaintiff's Complaint sufficiently alleges the elements of a §1985(3) action. However, pursuant to the teachings of Griffin, the Court must then identify a source of congressional

power to reach the private conspiracy so alleged. Griffin v. Breckenridge, supra, 403 U.S. at 104. Although there is no statutory requirement of State participation or support for the conduct of the individual conspirators proscribed by §1985(3), there is a requirement that the conspiracy deprive the Plaintiff of a federally protected right. Cohen v. Illinois Institute of Technology, 524 F.2d 818, 828 (Seventh Cir. 1975). That requirement would be satisfied in this case if there was State action involved or if the constitutional rights of the Plaintiff at stake were ones that are entitled to protection against anyone, rather than merely protection from impairment by a state. Id.

In Griffin the Supreme Court found two sources of power to reach the private conspiracy alleged therein: §2 of the Thirteenth Amendment and the right of interstate travel. The Supreme Court determined that these constitutional rights were not mere prohibitions against objectionable state action but were assertable against private as well as governmental interference. Neither of these sources of congressional power are availing in this case. See Baer v. Baer, supra, 450 F.Supp. at 493. Accordingly, the Court must in the instant case look elsewhere in the Constitution for congressional power to reach the private conspiracy involved herein.

In his Complaint Plaintiff alleges that the Defendants conspired

to deprive him of the equal protection of the laws with regard to rights guaranteed him by the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments. These Amendments do not provide congressional power to reach the private conspiracy in this case. The first ten amendments to the Constitution, the part generally referred to as the Bill of Rights, enumerate certain fundamental principles and rights of citizenship which are guaranteed only against violation or abridgment by the federal or state governments. These cannot generally be affirmatively enforced by Congress against unlawful acts of individuals. See 16 Am.Jur.2d Constitutional Law §330 (1964). It is equally well settled that the Fourteenth Amendment is not a protection against purely

private interference and may be violated only by the action of a state. See, e.g., District of Columbia v. Carter, supra, 409 U.S. at 423; Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Cohen v. Illinois Institute of Technology, supra, 524 F.2d at 828. This Court has already decided that there was not state action in this case. 6/

To the extent the Plaintiff asserts that §5 of the Fourteenth Amendment provides Congress with the power to reach private conspiracies, the court in Baer v. Baer, supra, considered the same and determined:

6/ Under 42 U.S.C. §1983, the "under color of state law" requirement is the same as the "state action" requirement of the Fourteenth Amendment. Gibbs v. Titelman, 502 F.2d 1107, 1110 (Third Cir. 1974), cert. denied, 419 U.S. 1039, 95 S.Ct. 526, 42 L.Ed.2d 316 (1974).

> It is the conclusion of this court, which finds support in the decisions of the Seventh and Fourth Circuits, that it would be unsound in the absence of guidance from the Supreme Court to hold Congress has the power under § 5 of the Fourteenth Amendment to reach the private conspiracy in this case. Murphy v. Mount Carmel High School, 543 F.2d at 1195; Bellamy v. Mason's Store, Inc., 508 F.2d at 507.
>
> Aside from the absence of a firm constitutional foothold this court is persuaded by the limits of its own power that § 1985(3) should not be applied to private religious controversies.

Id. 450 F.Supp. at 496. This Court agrees with the above conclusion of the Court in Baer.

In view of the above, as Plaintiff's Complaint establishes no factual basis for finding any form of state involvement, it fails to state a claim upon which relief can be granted under §1985(3) as well as §1983. Accordingly, the Court concludes that Defendants are entitled

to judgment in their favor dismissing Plaintiff's §1985(3) claim.

MEDICAL MALPRACTICE

In his third cause Plaintiff alleges that Defendants Dr. Taylor and Dr. Kevin M. Gilmartin committed medical malpractice and that the malpractice was aided and abetted by the other Defendants.

Plaintiff alleges that Dr. Taylor sought and illegally obtained a court order to treat Plaintiff in the relationship of physician and patient; gave false testimony to obtain said order; employed Dr. Gilmartin, a clinical psychologist, to give false and misleading testimony by letter to assist in obtaining the order; prescribed experimental deprogramming treatment of Plaintiff rather than recognized treatment; denied Plaintiff

needed medical treatment during the de-programming; failed to obtain a report of a psychiatrist on Plaintiff's condition as ordered by the Court; used unqualified laymen in the treatment of Plaintiff; failed to adequately diagnose Plaintiff's medical and physical health; treated Plaintiff without his consent; failed to inform Plaintiff of the dangers of proposed treatment and misinformed Plaintiff of his condition; and failed to comply with the court orders to stop treatment and release Plaintiff.

Plaintiff alleges that Dr. Gilmartin wrote a professional opinion on the state of Plaintiff's mental health, which opinion was filed in the Oklahoma guardianship proceeding, without examining Plaintiff so as to illegally harass and persecute Plaintiff by unfounded

legal proceeding; prescribed experimental deprogramming procedures rather than recognized treatment of Plaintiff; used unqualified laymen to carry out treatment; failed to adequately supervise the laymen and other asistants; treated Plaintiff without his consent; failed to adequately diagnose Plaintiff's mental health; failed to inform Plaintiff of the dangers of the experimental treatment and misinformed Plaintiff of his condition; and failed to comply with court orders to stop treatment and release Plaintiff.

The Taylors move the Court to dismiss Plaintiff's claim against Dr. Taylor on the basis that Dr. Taylor could not be guilty of malpractice as a physician-parent relationship between Dr. Taylor and the Plaintiff was that of a father and son, and not

that of a physician and patient.

Howard and Trauscht also move to dismiss this cause of action. They also contend that Plaintiff's medical malpractice action must fail as against all Defendants since there was no physician-patient relationship between Plaintiff and either Dr. Taylor or Dr. Gilmartin or any other Defendant.

In opposition to said Defendants' motion, Plaintiff contends that there was a physician-patient relationship between Drs. Taylor and Gilmartin and Plaintiff as Dr. Taylor examined him and prescribed for him and as Dr. Gilmartin counseled with Plaintiff by phone, examined him in person in Arizona, conferred with his parents, and wrote two opinion letters on his condition. Plaintiff contends that the remaining Defendants aided and abetted those Defendants in the malpractice.

Upon examination of the record in this case, the Court concludes that the motions for summary judgment should be overruled as to Plaintiff's third cause of action. The Court is unable to conclude that there is no material issue of the fact left to be resolved with regard to Plaintiff's medical malpractice claim and that Defendants are entitled to judgment on that cause of action as a matter of law. The existence of the relationship between a physician and a patient is a question of fact depending on whether the patient entrusted himself to the care of the physician and whether the physician accepted the case. 61 Am.Jur.2d Physicians, Surgeons and Other Healers §96, at 216 (1972). The Court cannot try an issue of fact in a Rule 56 motion. 10 Wright & Miller, Federal

Practice and Procedure: Civil §2712, at 379 (1973), and the cases collected therein.

LEGAL MALPRACTICE

Plaintiff's fourth cause of action is based on the alleged legal malpractice of Defendants Wayne N. Howard and Michael E. Trauscht.

Plaintiff alleges Howard participated in experimental psychological treatment and confinement of Plaintiff without a license as a mental health professional; filed an illegal guardianship proceeding in Arizona State Court; secreted Plaintiff from Plaintiff's attorneys and extorted Plaintiff's signature on legal documents while holding Plaintiff without letting Plaintiff seek advice of counsel; lied to the Oklahoma County District Court as to Plaintiff's mental

condition and desires; and disobeyed an order of the Oklahoma County District Court.

He alleges that Trauscht appeared as both an attorney and a witness in the same legal proceedings; participated in an ex parte hearing in the same case; gave false and misleading testimony; participated in experimental psychological treatment and confinement of Plaintiff without a license as a mental health professional and organized the Fouda-tion to do likewise; and refused to obey an order of the Oklahoma County District Court.

Plaintiff alleges that said Defendants' actions were willful, malicious or grossly negligent and in violation of the Canons of Professional Ethics for lawyers.

Howard and Trauscht move the

Court to dismiss this cause of action on the basis that Plaintiff has not alleged or established a prima facie case of legal malpractice. They assert that as Plaintiff has not established an attorney-client relationship between themselves and the Plaintiff, Plaintiff has not established that they owe a duty to Plaintiff or that they breached any such duty. They contend that such a relationship is essential to establishing legal malpractice.

In opposing the motion of Howard and Trauscht, Plaintiff contends that it is not essential that Plaintiff establish an attorney-client relationship in a legal malpractice claim. Plaintiff further contends that by virtue of the Oklahoma County District Court's order revoking the temporary

guardianship order and ordering the deprogrammers to return Plaintiff to Oklahoma City, there is a question of fact as to whether Howard and Trauscht owed Plaintiff a duty.

Plaintiff's fourth cause of action does not arise from the negligence of an attorney in the performance of duties as an attorney and of a legal nature for his client, as in the typical action for legal malpractice. Instead, it arises from the alleged wrongful acts of Howard and Trauscht in connection with the attempted deprogramming of Plaintiff. The alleged wrongful actions performed by those Defendants were not actions performed as lawyers or actions of a legal nature, but were of a nonlegal nature which could have been committed as well by a nonlawyer. Plaintiff does not allege that there was an attorney-

client relationship between Howard and Trauscht and himself; instead, he complains that these Defendants injured him through various wrongful acts allegedly done in connection with the deprogramming.

It is well established in Oklahoma and most other jurisdictions that as a matter of law an attorney cannot be held liable for legal malpractice to a third party with whom he was not in privity by reason of negligence while representing his client. An attorney will be held liable for negligence in the conduct of his professional duties only to his client. See Franke v. Midwestern Oklahoma Development Authority, 428 F.Supp. 719, 72[illegible] (W.D. Okla. 1976), and the cases cited therein; 7 Am.Jur.2d Attorneys at Law §167 (1963); 7 C.J.S. Attorney and Client §140 (1937); Annot.,

Attorney's liability, to one other than his immediate client, for consequences of negligence in carrying out legal duties, 45 A.L.R.3d 1181, §3 (1972).

Accordingly, the Court finds that Plaintiff's fourth cause of action fails to state a claim for legal malpractice against Howard and Trauscht upon which relief can be granted. The allegations Plaintiff makes against Howard and Trauscht in this cause of action fall more appropriately under Plaintiff's fifth, sixth, or seventh causes of action. See generally Thomas Fruit Co. v. Levergood, 274 P. 471 (Okla. 1929); Anderson v. Canaday, 131 P. 697 (Okla. 1913); 7 Am.Jur.2d Attorneys at Law §196 (1963); 7C.J.S. Attorney and Client §52b (1937); Annot., Liability of attorney acting for client, for false imprisonment or malicious

prosecution of third party, 27 A.L.R.3d 1113 (1969). Defendants Howard and Trauscht are entitled to a judgment in their favor dismissing the fourth cause of action.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff alleges in his fifth cause of action that Defendants conspired to inflict severe and extreme emotional distress on Plaintiff by subjecting him to the deprogramming ordeal. He avers that as a result of Defendants' actions he became physically ill and suffered extreme emotional distress; was put to great abuse, mental torture and trouble; was prevented from practicing his religion; was subjected to loss of health, nervous prostration and great mental and physical suffering; and was deprived of his liberty, property and constitutional rights.

Howard and Trauscht move to dismiss this cause of action. They contend that there is no evidence that Plaintiff was physically harmed or that he suffered any monetary loss and argue that this cause of action is a duplication of Plaintiff's seventh cause of action for conspiracy to commit assault and battery.

Plaintiff contends in opposition to Howard and Trauscht's motion that his fifth cause of action alleges the tort of intentional infliction of emotional distress of mental anguish and argues that there is a question of fact as to whether Plaintiff can recover on that theory.

In Breeden v. League Services Corp., 575 P.2d 1374 (Okla. 1978), the Oklahoma Supreme Court recognized the tort of intentional infliction of

emotional distress, as a separate and distinct basis for tort liability without the presence of elements necessary to other torts, such as assault, false imprisonment, trespass to land or the like, citing Restatements of Torts (Second), 1965, §46, Comment b. It indicated that in a tort action involving a Plaintiff's right to be free from emotional distress:

> The court, in the first instance, must determine whether the defendant's conduct may reasonably be regarded so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given case has been significantly extreme and outrageous to result in liability. Likewise, it is for the court to determine, in the first instance, whether based upon the evidence presented, severe emotional distress can be found. It is for the jury to determine whether, on the evidence, severe emotional distress in fact existed. (Footnote omitted. Emphasis in original).

Breeden v. League Services Corp., supra, 575 P.2d at 1377-78.

In the instant case, the Court is unable to conclude as a matter of law that outrageous or extreme conduct could not be found to exist in this case. Accordingly, the motion of Howard and Trauscht for a summary judgment in their favor on Plaintiff's fifth cause of action should be overruled.

CONSPIRACY TO FALSELY IMPRISON

In his sixth cause of action, Plaintiff alleges that the Defendants conspired to cause Plaintiff to be taken into custody and held, initially under an illegal temporary guardianship order and later without any legal basis whatsoever, through force and threats, against Plaintiff's will. He avers that he was unlawfully imprisoned, detained and restrained of his liberty

from July 15, 1976 to August 1, 1976.

Howard and Trauscht move to dismiss this cause of action against them. They contend that there was a valid court order authorizing the restraint of Plaintiff the entire time he was in the care, custody and control of his parents and maintain that there can be no false imprisonment when the person involved is confined pursuant to a valid court order. They further argue that there is no evidence that either of them physically restrained or threatened Plaintiff in any manner or that they conspired with the other Defendants to unlawfully restrain Plaintiff.

In opposition to Howard and Trauscht's motion, Plaintiff contends the object of the deprogramming conspiracy included false imprisonment.

As noted by the parties, false

imprisonment is the unlawful restraint of an individual's personal liberty or freedom of locomotion. S.H. Kress & Co. v. Bradshaw, 99 P.2d 508 (Okla. 1940); 32 Am.Jur.2d False Imprisonment §1 (1967); 35 C.J.S. False Imprisonment §1 (1960). The elements of false imprisonment are (1) the detention of the person, and (2) the unlawfulness of the detention. 32 Am.Jur.2d False Imprisonment §5 (1967); 35 C.J.S. False Imprisonment §5 (1960).

It appears to the Court that genuine issues of material facts are present in this case as to both of the essential elements of the wrong complained of herein and particularly as to whether the alleged detention of Plaintiff was unlawful or lawful, and if unlawful, if Howard and Trauscht or any other Defendants are responsible

for the detention. The Court is not satisfied that this cause of action can be disposed of properly by summary judgment on these matters.

Accordingly, Howard and Trauscht's motion for summary judgment on the sixth cause of action should be overruled.

CONSPIRACY TO COMMIT ASSAULT AND BATTERY

In his seventh cause of action Plaintiff alleges that the Defendants' acts and threats against him during the deprogramming placed him in reasonable apprehension of bodily harm; that Defendant David Taylor and other agents of Defendants forced him to the floor and tore off his monastic robes and crucifix; that he was struck and threatened by a guard placed over him by Defendant Howard; and that during the deprogramming Defendants threatened him with bodily harm and assaulted his

mental wellbeing; and that all of said acts were done without provocation and with intent to injure Plaintiff.

Howard and Trauscht move to dismiss this cause of action against them. They contend that it duplicates the fifth cause of action for intentional infliction of emotional distress and maintain that the evidence establishing that none of the Defendants conspired to assault or physically harm Plaintiff. They further contend that they are not responsible for any acts of assault or battery committed by any of the other Defendants.

Plaintiff opposes the motion of Howard and Trauscht. He argues that since the evidence shows that Howard and Trauscht knew that members of the deprogramming team were prone to violence, they are legally responsible for the assault and battery the de-

programming entails.

The Court is not satisfied that genuine issues of material facts are not present with regard to this cause of action. Summary judgment is therefore inappropriate as to Plaintiff's seventh cause of action and Howard and Trauscht's motion for the same should be overruled.

In view of the foregoing, a judgment in favor of the Defendants is to be entered herein dismissing Plaintiff's first cause of action for conspiracy to violate civil rights and a judgment in favor of Defendants Howard and Trauscht is to be entered dismissing Plaintiff's fourth cause of action for legal malpractice.

The motions for summary judgment are overruled as to Plaintiff's third, fifth, sixth and seventh causes of

action.[7/] As the Court has already indicated, the Defendants have not attacked Plaintiff's second cause of action.

It is so ordered this 30th day of December, 1978.

Fred Daugherty
United States District Judge

JUDGMENT ENTERED ON DECEMBER 30, 1978

7/ In overruling the motions for summary judgment on these causes of action, the Court further concludes that it is unable at this time to find as a matter of law that the Foundation was not involved in the deprogramming attempt.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

WALTER ROBERT TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	NO.
KEVIN M. GILMARTIN,	)	
MICHAEL E. TRAUSCHT,	)	CIV-77-0351-D
WAYNE N. HOWARD,	)	
FREEDOM OF THOUGHT FOUNDATION, INC.,	)	
JOSEPH ALEXANDER,	)	
ESTHER ALEXANDER,	)	
GARY SCHARFF,	)	
WALTER WINSTON TAYLOR	)	
SYLVIA TAYLOR,	)	
DAVID TAYLOR and	)	
DOES I THROUGH X,	)	
	)	
Defendants.	)	

O R D E R

Plaintiff Walter Robert Taylor brings this action against the above-named Defendants alleging seven causes of action against the Defendants; first, for conspiracy to violate his civil rights, pursuant to 42 U.S.C. §1983 and 1985(3); second, conspiracy to obstruct

justice, pursuant to 42 U.S.C. §1985(2); third, conspiracy to commit medical malpractice; fourth, legal malpractice; fifth, intentional infliction of emotional distress; sixth, conspiracy to falsely imprison; and seventh, conspiracy to commit assault and battery. It is asserted that this Court has jurisdiction of the action pursuant to 28 U.S.C. §1331 (federal question), §1332 (diversity of citizenship) and §1343 (civil rights).

Upon consideration of motions to dismiss and motions for summary judgment filed herein by Defendants Howard, Trauscht, Freedom of Thought Foundation, Inc. and the Taylors, the Court on December 30, 1978 entered an Order and Judgment dismissing Plaintiff's cause of action for conspiracy to violate civil rights brought pursuant

to 42 U.S.C. §§1983 and 1985(3) and his cause of action for legal malpractice against Defendants Howard and Trauscht. The Court overruled said Defendants' motions as they pertained to Plaintiff's causes of action for conspiracy to commit medical malpractice, intentional infliction of emotional distress, conspiracy to falsely imprison and conspiracy to commit assault and battery. As the Defendants' motions did not address Plaintiff's causes of action for conspiracy to obstruct justice under 42 U.S.C. §1985(2), the Court did not consider that cause of action in its December 30, 1978 Order and Judgment. 1/

1/ Counsel for the moving parties state that their original motions did not address Plaintiff's cause of action under 42 U.S.C. §1985(2) as they were of the opinion that during the pretrial conference of this action

on April 25, 1978, Plaintiff's counsel indicated that Plaintiff's cause of action for conspiracy to obstruct justice under 42 U.S.C. §1985(2) was merged into the Plaintiff's cause of action alleging conspiracy to violate civil rights under 42 U.S.C. §§1983 and 1985(3). Upon examination of the record of this case and notes concerning pretrial conference in this case, the Court has not found any indication that Plaintiff's cause of action under 42 U.S.C. §1985(2) has been merged into his cause of action under 42 U.S.C. §§1983 and 1985(3).

The action is now before the Court on the motions for partial summary judgment filed herein by Defendants Howard, Trauscht, Freedom of Thought Foundation, Inc. and the Taylors. Said Defendants have filed briefs in support of their motions and the Plaintiff has filed briefs in response to the same. The Court has conducted a hearing on the motions now at issue.

In their instant motions, the moving parties move the Court for a partial summary judgment in their favor on Plaintiff's cause of action under 42 U.S.C. §1985(2) for conspiracy to obstruct justice. They assert that as subsection (2) of §1985 is identical in its scope to subsection (3) of §1985, the requirements which apply to an action under subsection (3) equally

apply to an action alleged to arise under subsection (2) and that the Court's determination in its Order of December 30, 1978 that §1985(3) is not applicable in this action also applies to Plaintiff's allegations under 42 U.S.C. §1985(2). The moving parties contend that in both subsection (2) and subsection (3) of §1985, the congressional power to reach the private conspiracy complained of by the Plaintiff derives from the Fourteenth Amendment, and that this Amendment provides no protection against purely private interference but may be violated only by state action, which they maintain is not present in this case.

Plaintiff responds that the Defendants' motions should be overruled as subsection (2) of §1985 is

directed against the conspiracies of private persons who interfere with rights secured by the Fourteenth Amendment and that it is thus unnecessary to the maintenance of an action under that provision to allege or show any state action or involvement by any state official. Plaintiff further argues that even if state action is required for an action under 42 U.S.C. §1985(2), state action is present in this case as the conspiracy that Plaintiff complains of was made possible only by the action of the state of Oklahoma in clothing Defendant Walter W. Taylor with state authority in the form of a void guardianship order. In a supplemental brief, Plaintiff asserts that either the right of interstate travel or §5 of the Fourteenth Amendment are sources of congressional power for the application of 42 U.S.C. §1985(2) to this

case, citing Rankin v. Howard, 457 F. Supp. 70 (D. Ariz. 1978), and Britt v. Suckle, 453 F.Supp. 987 (E.D. Tex. 1978).

The Defendants have filed a reply to the Plaintiff's response wherein they argue that there is no source of power in this case which would warrant applying 42 U.S.C. §1985 to a private conspiracy. They additionally argue that 42 U.S.C. §1985 cannot apply in this case as the Plaintiff has failed to allege the existence of the requisite class-based animus necessary under §1985, citing Weiss v. Patrick, 453 F.Supp. 717 (D. R.I. 1978), aff'd mem., 588 F.2d 818 (First Cir. 1978), cert. denied, _____ U.S. _____, 99 S. Ct. 2858, 61 L.Ed.2d 296 (1979).

Subsection (2) of 42 U.S.C. §1985 reads in its entirety as follows:

> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impedding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

In this action, Plaintiff relies on that part of §1985(2), following the penultimate semicolon, which deals with impeding

the due course of justice in any State or Territory.

As both §1985(2) and §1985(3) derive from the original Section 2 of the Civil Rights Act of 1871, the same analysis of a complaint performed by the Supreme Court in Griffin v. Breckenridge, 403 U.S. 88, 91, S.Ct. 1790, 29 L.Ed.2d 338 (1971), in order to determine whether a cause of action under §1985(3) had been stated is generally followed by courts in determining whether a cause of action under §1985(2) has been stated. See Britt v. Suckle, supra, 453 F.Supp. at 991; see, e.g., Rankin v. Howard, supra; see generally Smith v. Yellow Freight System, Inc., 536 F.2d 1320 (Tenth Cir. 1976); Jones v. United States, 536 F.2d 269 (Eighth Cir. 1976), cert. denied, 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 750 (1977). In Griffin, the Supreme Court considered

first, whether the facts alleged in the complaint before it fell within the terms of §1985(3). Secondly, recognizing that conduct within the terms of the statute might go beyond the power of Congress to regulate, the Court identified the source of congressional power to reach the conduct alleged.

Applying the foregoing analysis in this case, the Court concludes that Plaintiff's Complaint satisfies the first of the aforementioned requirements, in that the facts alleged in the Complaint fall within the terms of §1985(2). However, the Court finds that Plaintiff's §1985(2) claims must fail as the Court is unable to determine that Congress has the power to reach the private conspiracy involved in this case.

In determining that the conspiracy alleged in Plaintiff's first cause of ac-

tion falls within the terms of §1985(2), the Court disagrees with the Defendants' contention that Plaintiff has failed to allege sufficient facts to establish a class-based animus for purposes of §1985 (2). It would appear that the religious followers of the Old Catholic Church may constitute a class within the meaning of §1985. See e.g., Murphy v. Mount Carmel High School, 543 F.2d 1189, 1192 n. 1 (Seventh Cir. 1976); Rankin v. Howard, supra, 457 F.Supp. at 75; Baer v. Baer, 450 F.Supp. 481, 491 (N.D. Cal. 1978). And a fair and reasonable reading of Plaintiff's Complaint demonstrates that the Defendants singled out Plaintiff because of his status as a member of the Old Catholic Church, and not because of his individual beliefs. In other words, this class status is not created by the mere fact that Plaintiff possesses the right to freedom of religion, as do all persons,

but rather by the fact that he is a member of a fringe or minority religious group. It is the Defendants' abhorrence of that group that motivates them to deprogram individuals such as Plaintiff. As stated in Baer:

> While religious status may differ from racial status because it is not a congenital and inalterable trait, membership in a minority religious group. like membership in a minority racial group, has often excited the fear, hatred and irrationality of the majority. Two thousand years of human compellingly prove that no easier road to martydom is found than in adherence to an unpopular religious faith. For these reasons, and because the legislative history does not indicate otherwise, this court concludes that religious discrimination may be encompassed by the terms of § 1985(3).

Baer v. Baer, supra, 450 F.Supp. at 491; see Rankin v. Howard, supra, 457 F.Supp.

at 75; but see Weiss v. Patrick, supra, 453 F.Supp. at 723-24.

It is also clear that §1985 permits actions against private persons for conspiracies which involve no state action. E.g., Griffin v. Breckenridge, supra, 403 U.S. at 101; Taylor v. Nichols, 558 F.2d 561 567 (Tenth Cir. 1977); Rankin v. Howard, supra, 457 F.Supp. at 74.

The Court therefore concludes that Plaintiff's Complaint sufficiently alleges the elements of a §1985(2) action. However, pursuant to the teachings of Griffin, the Court must then identify a source of congressional power to reach the private conspiracy so alleged. Griffin v. Breckenridge, supra, 403 U.S. at 104; Britt v. Suckle,

supra, 453 F.Supp. at 998.

In Griffin the Supreme Court found two sources of power to reach the private conspiracy alleged therein: §2 of the Thirteenth Amendment and the right of interstate travel. The Supreme Court determined that these constitutional rights were not mere prohibitions against objectionable state action but were assertable against private as well as governmental interference. Neither of these sources of congressional power are availing in this case. §2 of the Thirteenth Amendment is not involved in this case as there is no racial class alleged herein. Rankin v. Howard, supra, 457 F.Supp. at 75; see Baer v. Baer, supra, 450 F.Supp. at 492-493. Nor is the second ground for congressional power stated in Griffin, the right to interstate travel

present in this case. Examination of the Complaint herein reveals Plaintiff has not alleged that one of the objects of the alleged conspiracy to obstruct justice was to prevent him from traveling among and between the several states or to otherwise impair his federal right to interstate travel. See Rankin v. Howard, supra, 457 F.Supp. at 72; Baer v. Baer, supra, 450 F.Supp. at 492. Therefore, Plaintiff has failed to allege he has suffered from tortious conduct which Congress may reach under its power to protect the right of interstate travel. Baer v. Baer, supra. Accordingly, the Court must in the instant case look elsewhere in the Constitution for congressional power to reach the private conspiracy involved herein.

In his supplemental Brief in response to the instant Motions Plaintiff maintains that §5 of the Fourteenth Amendment provides congressional power to reach the private conspiracy in this case. However, it is well settled that the Fourteenth Amendment is not a protection against purely private interference and may be violated only by the action of a state. See, e.g., District of Columbia v. Carter, 409 U.S. 418, 423, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973); Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Cohen v. Illinois Institute of Technology, 524 F.2d 818, 828 (Seventh Cir. 1975). This Court has previously decided in its Order herein of December 30, 1978 that there was not state action in this case.

To the extent the Plaintiff asserts that §5 of the Fourteenth Amendment provides Congress with the power to reach private conspiracies, the court in Baer v. Baer, supra, considered the same in the context of §1985(3) and determined:

> It is the conclusion of this court, which finds support in the decisions of the Seventh and Fourth Circuits, that it would be unsound in the absence of guidance from the Supreme Court to hold Congress has the power under § 5 of the Fourteenth Amendment to reach the private conspiracy in this case. Murphy v. Mount Carmel High School, 543 F.2d at 1195; Bellamy v. Mason's Stores, Inc., 508 F.2d at 507.
>
> Aside from the absence of a firm constitutional foothold this court is persuaded by the limits of its own power that § 1985(3) should not be applied to private religious controversies.

Id. 450 F.Supp. at 495; but see Britt v. Suckle, supra, 453 F.Supp. at 1002. This Court agrees with the above

conclusion of the court in Baer and determines that it is equally applicable to Plaintiff's §1985(2) claim herein.

In view of the above and as Plaintiff's Complaint establishes no factual basis for finding any form of state involvement, it fails to state a claim upon which relief can be granted under §1985(2). The Court therefore concludes that Defendants are entitled to judgment in their favor dismissing Plaintiff's §1985(2) claim. Accordingly, the Court determines that a judgment in favor of the Defendants is to be entered herein dismissing Plaintiff's second cause of action for conspiracy to obstruct justice.

It is so ordered this 28th day of December, 1979.

Fred Daugherty
United States District Judge

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ALEXANDER L. STEVAS,
CLERK

No. 82-698

In the Supreme Court of the United States

OCTOBER TERM, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners,

v.

WALTER ROBERT TAYLOR,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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December, 1982

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No. 82-698

In the Supreme Court of the United States

OCTOBER TERM, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners,

v.

WALTER ROBERT TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Plaintiff, Respondent here, is a monk who resides at an Old Catholic Monastery in a suburb of Oklahoma City. He was taken against his will from his monastery by Oklahoma County Sheriff's Deputies to a hearing before the District Court of Oklahoma County, State of Oklahoma, for a "temporary guardianship" hearing July 15, 1976. At the time he was 21 years old. Defendants sought Plaintiff's removal from his monastery in order that he could be "deprogrammed", a process which involves use of "confrontative" techniques of "counseling" with the goal of the "deprogrammee's" renunciation of his religious beliefs.

On July 14, 1976, lawyers for the applicant in the "temporary guardianship" proceeding conferred with the

Associate District Judge to whom the application was eventually presented, Judge John A. "Tony" Benson, who then contacted the Probate Judge and requested that he be allowed to hear the matter. The "temporary guardianship" proceeding was then filed. Judge Benson then conducted a hearing July 15, 1976, without notice to Plaintiff, and wholly in Plaintiff's absence which culminated in Judge Benson's ordering the Plaintiff taken into custody. Judge Benson had decided to order that a temporary guardian of Plaintiff's person be appointed so that it could be determined if Plaintiff were under the influence of a religious cult. Judge Benson stated that he wanted the Plaintiff taken into custody "so that [Plaintiff] could be given notice of a [permanent] guardianship hearing. . . ."

Upon Plaintiff's being taken to the Oklahoma Court, his counsel of choice was excluded from the hearing, and at the close of the "temporary guardianship" hearing, the same day Plaintiff was picked up by sheriff's deputies, Judge Benson, though finding that Plaintiff appeared "normal in every respect", formally entered an "Order Appointing Temporary Guardianship of the Person" because, according to Judge Benson:

> ". . . the right of [Plaintiff's] father and . . . family to know [Plaintiff] decided . . . to spend the rest of [his] life away from them secluded in a monastery . . . probably overrides any individual right [Plaintiff] might possibly have on a temporary basis . . . to be free from . . . custody."

The July 15, 1976, order provided:

> "1. Notice of the time and place of hearing is not required.

2. Dr. Walter Taylor is appointed the temporary Guardian of the Person of Petitioner's child, to-wit: Walter Robert Taylor and that temporary Letters of Guardianship issue.

3. The Temporary Guardian of the person shall have power to: (a) take said proposed ward into Petitioner's personal custody to have proposed ward counselled, examined, and treated by persons including, but not limited to physicians, psychiatrists, psychologists, social workers and lay persons; (b) to keep said ward in Petitioner's custody, even in the event said ward wishes to leave said custody; and (c) such further powers as are necessary to exercise those above granted.

4. Further hearing in this matter will be held at August 13, 1976 at 3:00 P.M. at which time the ward is directed to show cause if any the ward has, why the Petitioner, Dr. Walter Taylor should not be appointed permanent Guardian of the ward's person. . . ."

On authority of Judge Benson's "temporary guardianship" order (hereafter "Judge Benson's Order"), Plaintiff was taken that same day, July 15, 1976, from Oklahoma City, Oklahoma, to Akron, Ohio. He was held for approximately one week in Akron where he was kept at a motel under constant guard. There he underwent "deprogramming": (1) "deprogrammers" yelled at him constantly; (2) they kept fresh "deprogrammers" yelling at him by switching off in crews; (3) they said they would have him tracked down by the state patrol if he escaped, and that they would have him thrown in jail and "deprogrammed" in jail; (4) the "deprogrammers" threatened to have the police close down Plaintiff's monastery, to have the

"temporary guardianship" made permanent and have the "deprogramming" continue indefinitely, to have Plaintiff committed to a mental institution and to beat him; (5) he was deprived of sleep and by innuendo he was told that he would be subjected to shock treatment; (6) he suffered severe gastritis, diarrhea and abdominal cramping, and when he complained, the "deprogramming" seemed to intensify; (7) they threw cold water on him, shined a light in his eyes, tore his monastic clothes off him, and cut his hair and beard; (8) they told him they called friends and religious leaders from a list Plaintiff had given them of people who would vouch for him, and they stated that the friends reported his religion was not legitimate. The "deprogrammers" indicated the pressure would cease if Plaintiff would renounce his religion.

July 22, 1976, the District Court of Oklahoma County, acting through a different judge than Judge Benson, entered an order declaring Judge Benson's Order void ab initio which commanded Plaintiff's return to Oklahoma City. July 23 or July 24, 1976, Plaintiff was taken from Akron to Phoenix, Arizona, where he was held, still under guard, for the "rehabilitation" phase of the "deprogramming". He escaped July 31, 1976, and returned to Oklahoma City.

Plaintiff brought the instant action against the "deprogrammers", his parents and brother seeking $300,000.00 compensatory and $3,000,000.00 punitive damages. Pursuant to agreement Plaintiff's parents and brother were dismissed prior to trial. Plaintiff sought relief on the basis of a civil conspiracy and specific legal theories which included violation of civil rights under 42 U.S.C. §§ 1983 and 1985(3),

obstruction of justice under 42 U.S.C. § 1985(2), intentional infliction of emotional distress, false imprisonment and assault and battery. He stated at paragraph 30 of his Complaint that Defendants' actions were taken "under color of law through use of the judicial system, court orders and actions of the Sheriff's office of Oklahoma County, Oklahoma." He further alleged at paragraph 37 of this Complaint that:

> ". . . [D]efendants obtained an illegal temporary guardianship in Case No. P-76-1228 based on false representations without jurisdiction; . . . defendants inflicted mental torture on Plaintiff under color of law; . . . [and] defendants perpetrated fraud upon Plaintiff and the District Court of Oklahoma County in instituting a sham proceeding, not for the purpose of determining the competency of Plaintiff, but rather to gain custody or control of Plaintiff to subject him to experimental psychological procedures to alter his religious beliefs and practices contrary to law. . . ."

Plaintiff did not allege that either Judge Benson or the Sheriff's deputies who arrested him were co-conspirators of Defendants.

The Trial Court granted partial summary judgment against Plaintiff dismissing his 42 U.S.C. § 1983 count on the basis that the requisite color of state law was not present. It granted partial summary judgment against Plaintiff dismissing the 42 U.S.C. § 1985(3) count because it concluded that Plaintiff did not allege deprivations which would give rise to Congressional authority to reach private conspiracies. It granted partial summary judgment against Plaintiff dismissing his 42 U.S.C. § 1985(2) count on the basis that a source of Congressional power to reach the private conspiracy alleged could not be identified.

Trial of the action was to a jury. At the close of the evidence the court directed a verdict against Plaintiff on his false imprisonment claim on the basis that Judge Benson's Order was a "proper" order. The court also directed a verdict against Plaintiff on the intentional infliction of emotional distress claim, holding that the court was required in the first instance to determine whether Defendants' conduct was so "extreme" and "outrageous" as to permit recovery, and in the instant action, reasonable minds could not differ: Defendants' conduct was not so "extreme" and "outrageous" as to permit the question to be submitted to a jury. The case then went to the jury solely on the theory of conspiracy to assault and batter. The jury returned a verdict in favor of the Defendants and against Plaintiff, and the court entered judgment on the verdict.

Plaintiff perfected an appeal to the United States Court of Appeals for the Tenth Circuit which, by opinion dated July 30, 1982, reversed the Trial Court's grant of summary judgment and the Trial Court's directed verdicts and judgment on jury verdict, except the Trial Court's dismissal of Plaintiff's claim based upon 42 U.S.C. § 1983. As to Plaintiff's claims based upon 42 U.S.C. §§ 1985(2) and 1985(3) the Tenth Circuit cited the position of six members of the court in *United States* v. *Guest*, 383 U.S. 745 (1966), and held that Congress had the power to reach Defendants' private conspiracy to violate rights guaranteed Plaintiff by the Fourteenth Amendment. Defendants then sought review by this Court of the Tenth Circuit's reversal of the Trial Court's grant of summary judgment dismissing Plaintiff's 42 U.S.C. § 1985 claims.

REASONS FOR DENYING THE WRIT

I. THE WRIT SHOULD NOT ISSUE BECAUSE, CONTRARY TO PETITIONERS' POSITION, RESERVATION OF A QUESTION SHOULD NOT, IN AND OF ITSELF, PROVIDE GROUND FOR ISSUANCE OF A WRIT OF CERTIORARI.

This Court has stated the considerations for governing review on certiorari in *Sup. Ct. R.* 17. Reservation of a question is not among them. *Id.* Petitioners urge as their first reason for granting the writ that the Court of Appeals based its opinion below on a point which had been reserved by this Court. As authority for their argument they cite *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 545 (1976), in which the Court merely noted that the question before it had been reserved in the previous term. Reservation of a question because the facts of a particular case do not require that the question be answered should not, in and of itself, provide the basis for issuance of a writ. *See Sup. Ct. R.* 17.

II. A WRIT SHOULD NOT BE GRANTED BECAUSE, CONTRARY TO THE ARGUMENT OF PETITIONERS, THERE IS NO CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND DECISIONS OF THIS COURT.

The Court of Appeals' Opinion regarding the basis of congressional authority to reach the conspiracy alleged by Plaintiff is entirely consistent with decisions of this Court. Petitioners urge that a writ be granted because "The Tenth Circuit misconstrued, misapplied and misconceived this Court's reasoning in *United States* v. *Guest*." On the contrary, the Court of Appeals carefully analyzed and applied

United States v. *Guest*. In accordance with the position of six members of the Court in *Guest*, the Tenth Circuit held that Congress has the power to reach private conspiracies to violate Fourteenth Amendment guarantees.

Petitioners apparently assume that Plaintiff's failure to allege that Judge Benson was a co-conspirator of Defendants in attempting to coerce a renunciation by Plaintiff of his religion and lifestyle, eliminates state participation in the First and Fourteenth Amendment deprivations which Plaintiff suffered because the deprivations were thereby rendered private. They repeatedly urge that the only state involvement here is mere utilization of the judicial system.

Plaintiff stated at paragraph 20 of his Complaint:

> ". . . [T]here is no provision for temporary guardianships of adults under Oklahoma law. Such proceedings were without jurisdiction of the subject matter or the person of the Plaintiff. . . . Notwithstanding the illegal nature of the proceedings, the temporary guardianship was granted. . . ."

The Tenth Circuit analyzed: "The activity here in effect brought the state into a position which was tainted." Petitioners' Appendix at 64. The Court of Appeals further stated:

> "It is true that although the appellant does not claim that the state conspired to deprive him of his constitutional right, he does claim that the state unwittingly deprived him of those rights when the Sheriff's deputies forced Taylor to appear before Judge Benson under no apparent statutory authority and when the state court appointed his father temporary guardian without any jurisdiction whereby he was illegally

> delivered over to the defendants and was deprived of his freedom of association and his freedom to pursue his religious beliefs."

Petitioners' Appendix at 66-67.

The Tenth Circuit accurately summarized:

> "In the case at bar, however, the allegations extend beyond the private deprivation of constitutional rights. The contention is that the defendants formed a conspiracy to cause *the state to participate and deprive the plaintiff* of his liberty without due process and to interfere with his first amendment freedom of association and religion. . . ."

Petitioners' Appendix at 55-56.

Petitioners argue that Guest provides no authority for the Court of Appeals' holding because the degree of state action there was the equivalent of active participation by the state. In addition to citation to concurring opinions representing the view of six of the Justices in *Guest*, the Tenth Circuit relied upon the opinion of the Court, stating, "If, as Mr. Justice Stewart said in *United States* v. *Guest*, *supra*, that some limited state involvement may suffice, it clearly follows that the extensive state involvement in this case would certainly satisfy a necessary requirement." Petitioners' Appendix at 64-65. The reference was to Justice Stewart's statement for the Court that the Court has found state action in a variety of situations ". . . even though the participation of the state was peripheral, or its action was only one of several co-operative forces leading to constitutional violation." 383 U.S. at 755-56. As authority for that statement the Court cited *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), as an example. There the argument was made that judicial enforcement of racially restrictive

covenants did not constitute state action. This Court rejected the argument:

> "The difference between judicial enforcement and non-enforcement is the difference between being denied rights . . . and being accorded full enjoyment of those rights on an equal footing."

Id. at 19. There was a much stronger argument in *Shelley* that the state's participation through the judiciary was disinterested and indirect because in enforcing the restrictive covenants the state courts functioned as they always function. Here, in addition to providing the vehicle for constitutional deprivations through his "temporary guardianship" order, Judge Benson acted in the absence of all jurisdiction.

Petitioners incorrectly conclude: "Utilization of the state judicial system, absent some direct participation or sharing of the conspiratorial motives by the state judicial officer, is at best limited state involvement and not the extensive type of participation discussed in *United States* v. *Guest*." Judge Benson was not alleged to have sought to force Plaintiff to renounce his religion. However, Judge Benson, in the absence of any authority, patently intended that Plaintiff be separated from his fellow monks and not be allowed to practice his religion for the period of the "deprogramming". Judge Benson's involvement, though not characterized as conspiratorial, constitutes state participation in the deprivation of Plaintiff's First and Fourteenth Amendment rights. The fact that Judge Benson's role may have been that of an ignorant participant or as a dupe of Defendants, as opposed to having been purposeful in the conspiratorial sense, does not take this case outside the ambit of this Court's teachings in *United States* v. *Guest*.

III. CERTIORARI SHOULD BE DENIED BECAUSE, CONTRARY TO THE ARGUMENT OF PETITIONERS, THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS REGARDING 42 U.S.C. § 1985.

Contrary to Petitioners' assertion that the decision of the Court of Appeals here conflicts with decisions of other Courts of Appeals regarding 42 U.S.C. § 1985, the Tenth Circuit's opinion below is basically compatible with the Courts of Appeals cases cited by Petitioners when each case is limited to its own facts: *Phillips* v. *Trello*, 502 F.2d 1000 (3d Cir. 1974); *Bellamy* v. *Mason's Stores, Inc.*, 508 F.2d 504 (4th Cir. 1974); *Dombrowski* v. *Dowling*, 459 F.2d 190 (7th Cir. 1972); *Means* v. *Wilson*, 522 F.2d 833 (8th Cir. 1975); *Taylor* v. *Nichols*, 558 F.2d 561 (10th Cir. 1977); *Weise* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Cameron* v. *Brock*, 473 F.2d 608 (6th Cir. 1973); *Lopez* v. *Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975); *Richardson* v. *Miller*, 446 F.2d 1247 (3d Cir. 1971); *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971).

Phillips v. *Trello*, 502 F.2d at 1005, relies on *Dombrowski* v. *Dowling*. 459 F.2d at 194-95. In its opinion below (Petitioners' Appendix at 65-66), the Tenth Circuit specifically relied upon Justice Stevens' concurring opinion in *Great American Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 383-84 (1979), which also relied upon *Dombrowski* v. *Dowling*, 459 F.2d at 194-96. *Dombrowski* held that "state involvement" was necessary to reach Fourteenth Amendment deprivations. 459 F.2d at 195. Likewise *Bellamy* v. *Mason's Stores, Inc.* cited *United States* v. *Guest* and held that "some state involvement is necessary" to reach Four-

teenth Amendment deprivations. 508 F.2d at 506. There was considerable "state involvement" in the instant action. Petitioners' Appendix at 45-46, 54-56, 64-65, 66-68.

The remaining cases cited by Petitioners in support of their argument that the opinion below conflicts with other Courts of Appeals decisions so differ factually from the instant action that they are of little or no value. *Means* v. *Wilson* held that the right to vote in an Indian tribal election is protected from private conspiracies. 522 F.2d at 839. The complaints in *Taylor* v. *Nichols*, 558 F.2d at 567-68, and *Lopez* v. *Arrowhead Ranches*, 523 F.2d at 926-27, were dismissed because of the plaintiffs' failure to allege a class-based animus. In *Cameron* v. *Brock*, where a sheriff and his deputies were named as defendants, the determinative issue was whether supporters of a political candidate could constitute a class protected by the equal protection clause. 473 F.2d at 610. The court in *Weise* v. *Syracuse University* stated without elaboration that ". . . § 1985(3) embraces a limited category of private conspiracies, and that there is no state action requirement." 522 F.2d at 408. 42 U.S.C. § 1985(3) reached a private conspiracy in *Richardson* v. *Miller* because there was a racial animus. 446 F.2d at 1249. Purely private disruption of a worship service was reached under 42 U.S.C. § 1985(3) in *Action* v. *Gannon* because, according to the court, the Fourteenth Amendment protected the plaintiffs' First Amendment rights of freedom of assembly and worship. 450 F.2d at 1234-35. A concurring opinion argued that the conduct could be reached because a racial animus was involved. *Id.* at 1239. *Action* v. *Gannon* may well have been incorrectly decided, but it does not conflict with the Court of Appeals' decision in the instant action.

Contrary to Petitioners' assertion, the cases they cite do not support the position that there are conflicts within the circuits. The holding of the Eighth Circuit in *Action* v. *Gannon* and in *Means* v. *Wilson* that the private conspiracies there reviewed were subject to 42 U.S.C. § 1985(3) do not conflict. The Third Circuit's holding in *Phillips* v. *Trello*, 502 F.2d at 1005, that a § 1985(3) claim was not stated because the facts before it did not encompass a racial animus or state involvement does not conflict with its decision in *Richardson* v. *Miller*, where it found a racial animus. 446 F.2d at 1249. Finally, the Tenth Circuit's holding regarding 42 U.S.C. § 1985(3) in *Taylor* v. *Nichols* which rested on the absence of a class-based animus does not conflict with its opinion in the instant action where a class-based animus was identified. *See* Petitioners' Appendix at 50-52.

IV. THE WRIT SHOULD BE DENIED BECAUSE, EVEN ASSUMING PETITIONERS' ARGUMENT THAT THE STATE INVOLVEMENT HERE IS INSUFFICIENT ARGUENDO, THEIR CONSPIRACY CAN BE REACHED UNDER 42 U.S.C. §§ 1985(2) AND 1985(3) BECAUSE THEY DEPRIVED PLAINTIFF OF HIS RIGHT TO INTERSTATE TRAVEL.

The right to interstate travel is a source of Congressional power to reach private conspiracies under 42 U.S.C. § 1985(3). *Griffin* v. *Breckenridge*, 403 U.S. 88, 106 (1971). Both at trial and on appeal Plaintiff urged that right as a basis for Congressional authority to reach the conspiracy involved in the instant action but his position was rejected:

> ". . . [P]laintiff did not allege in his Complaint that an object of the defendants' conspiracy was to de-

> prive him of his right to travel interstate. He now urges this as a basis to uphold his claim under § 1985 (3). However, the facts do not lend themselves to a claim of interference with this right."

Petitioners' Appendix at 53-54, *see also* Petitioners' Appendix at 139-41, 148-49. The Court of Appeals decided the question incorrectly. Thus the outcome in this Court regarding the viability of Plaintiff's 42 U.S.C. § 1985 claims should be the same even if all the questions presented by Petitioners were decided in their favor.

It is unnecessary to plead Congressional authority under 42 U.S.C. §§ 1985(2) and 1985(3) to reach the conspiracy alleged. *Fed. R. Civ. P.* 8(a)(2) requires only a "short and plain statement" of the pleader's claim. It would be anachronistic to hold that the Federal Rules of Civil Procedure require a plaintiff to state in his complaint "magic" language that a specific constitutional provision proscribes a specific conspiratorial objective as the basis of Congressional authority to reach the conspiracy. *Cf. Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) (the Federal Rules of Civil Procedure do not require pleading of specific facts to support general allegations of discrimination). The purpose of pleading is to facilitate a proper decision on the merits." *Id.*

The Complaint, at paragraphs 21-23 and 26, states that the Plaintiff was held captive in Akron, Ohio, and Mesa, Arizona, and did not arrange for escape to Oklahoma City, Oklahoma, until July 31, - August 1, 1976. At paragraphs 28 and 35 it states specifically that Defendants conspired to deprive Plaintiff of his freedoms of liberty and association and to keep Plaintiff from attending court in the Dis-

trict Court of Oklahoma County, Oklahoma, July 28, 1976. Defendants clearly prevented Plaintiff's free travel from state to state.

A predominate purpose of "deprogramming" was Plaintiff's confinement to prevent his return to his church. That confinement occurred primarily in Ohio and Arizona. Plaintiff's monastery is located in Oklahoma. Clearly Defendants intended that Plaintiff not be allowed to exercise his right to interstate travel to associate with his friends at his monastery. They actually restricted Plaintiff's travel and association.

The complaint in *Griffin* v. *Breckenridge* involved allegations that a conspiracy had been inspired by the erroneous belief that an associate of plaintiff who merely lived out of state was a civil rights worker. This Court held:

> "Under these allegations it is open to the . . . [plaintiffs] to prove at trial that their federal right to travel interstate was one of the rights meant to be discriminately impaired by the conspiracy, that the conspirators intended to drive out-of-state civil rights workers from the State, or that they meant to deter [plaintiffs] from associating with such persons. This and other evidence could make it clear that . . . [plaintiffs] had suffered from conduct that Congress may reach under its power to protect the right to interstate travel."

403 U.S. at 106.

Contrary to the holding of the Court of Appeals and of the Trial Court, a complaint need not allege the source of congressional power to reach a Section 1985 conspiracy,

or allege in so many words that an object of the conspiracy was to prevent travel among and between the several states. The complaint in *Griffin* v. *Breckenridge* did not. 403 U.S. at 89-92. *See Ward* v. *Connor*, 657 F.2d 45, 48 (4th Cir. 1981), *cert. denied*, 102 S.Ct. 1253 (1982).

The Court of Appeals correctly decided that state involvement in the instant action was sufficient to support an action under 42 U.S.C. §§ 1985(2) and 1985(3). It incorrectly found that a deprivation of Plaintiff's right to interstate travel would not support the same claim. The crowded docket of this Court should not be further burdened by issuance of a writ of certiorari to review a case in which the same ultimate result should be reached even if Petitioners' questions presented were all decided in their favor.

CONCLUSION

For these reasons Walter Robert Taylor, Respondent, prays that Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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December, 1982

CERTIFICATE OF SERVICE

The undersigned John C. McMurry, a member of the Bar of this Court and counsel of record for Walter Robert Taylor, Respondent herein, hereby certifies that on the 3rd day of December, 1982, he caused to be served the foregoing Brief in Opposition to Petition for Writ of Certiorari on all parties by mailing three copies thereof by First Class Mail, postage prepaid, to each of their counsel of record, addressed as follows:

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No. 82-698

IN THE

Supreme Court of the United States

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October Term, 1982

WAYNE N. HOWARD and MICHAEL E. TRAUSCHT,
Petitioners and Cross-Respondents,

v.

WALTER ROBERT TAYLOR,
Respondent and Cross-Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITIONERS' REPLY BRIEF

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On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

PETITIONERS' REPLY BRIEF

STATEMENT OF THE CASE

The Tenth Circuit's opinion is now reported as *Taylor v. Gilmartin*, 686 F.2d 1346 (10th Cir. 1982).

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S RESERVATION OF AN IMPORTANT QUESTION OF LAW IS AN IMPORTANT CONSIDERATION.

The fact that this Court has reserved decision on a question is simply an expression of the fact that there has been no definitive decision on an important point of law. This reason for review is clearly within the contemplation of Sup. Ct. R. 17.1(c).

Even if that were not the case, Respondent's argument is still without merit, as it proceeds upon the assumption that the Court's discretion is limited by Sup. Ct. R. 17.1. This is patently untrue, as Sup. Ct. R. 17.1 expressly provides: "The following, *while neither controlling nor fully measuring the Court's discretion*, indicate the character of the reasons that will be considered." The questions raised in the Petition are within the ambit of the Court's review, and their character is such that certiorari should be granted.

II. THE TENTH CIRCUIT'S OPINION IS IN DIRECT CONFLICT WITH PREVIOUS OPINIONS OF THIS COURT.

Respondent incorrectly characterizes Petitioners' argument as being based upon the proposition that Respondent's failure to name Judge Benson as a co-defendant or co-conspirator eliminates the possibility of state action and therefore renders the alleged conspiracy among Petitioners private.

The fact that Judge Benson was neither a named defendant nor co-conspirator is cogent evidence of the fact that even Respondent did not consider the level of state activity presented by this case to rise to the level found in cases where "state action" was found. That fact alone is not, however, the core of Petitioners' argument.

As a result of over 100 years of Fourteenth Amendment and Civil Rights litigation, the term "state action" has come to be a term of art. As such, the term is more accurately perceived as a conclusion arrived at based upon the existence or absence of other facts rather than a fact in and of itself.

Finding "state action" (or its absence) requires in every case an examination of the particular facts to arrive at the

conclusion that the force of the state dictated a Constitutionally impermissible result. If that is the case, then the state becomes responsible for otherwise private acts. This principle is the single unifying analytical thread running throughout all the "state action" cases involving both state officials and private persons.

Recent opinions of this Court have begun to consider the question of "state action" in terms of whether or not the acts in issue were "fairly attributable to the state," *see, e.g., Rendell-Baker v. Kohn*, ___ U.S. ___, 102 S. Ct. 2764 (1982). The change in terminology in no way changes the factors implicit in consideration of the issue, but it is respectfully submitted that it reflects the nature of the analysis necessary with greater clarity.

Respondent's argument is based upon the proposition that a judge was involved in this matter; that judges are state officials, and therefore any act by the judge is "state action."

This simplistic analysis fails, first because the presence of the state in the factual setting of a case cannot, by itself, constitute "state action." If this were not true, the Court's decisions in a number of cases, including among others, *Evans v. Abney*, 396 U.S. 435 (1970); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) and *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), would necessarily have been directly contrary to the result which was reached.

Second, Respondent's argument (and the opinion of the Tenth Circuit) fail to consider the extent and character of Judge Benson's involvement, an examination necessary in any "state action analysis." Notwithstanding the fact that the Tenth Circuit considered Judge Benson's involvement too peripheral to be "state action" or action taken "under color

of state law", it nevertheless held that a lesser level of state involvement was adequate to implicate the state via the Fourteenth Amendment for purposes of § 1985, erroneously relying upon *United States v. Guest*, 383 U.S. 745 (1966).

As stated in the Petition, *Guest* presented facts amounting to active state participation, whereby the state *caused* the result complained of. That case does not stand for the proposition that the mere incidental presence of state officials, apart from any Constitutionally impermissible results mandated by the state through those officials, constitutes "state action."

The anomaly presented by the Tenth Circuit's analysis of this case in light of past precedent, plus the fact that there was no evidence at all that Judge Benson ordered or directed any of the alleged deprivations of Respondent's Constitutional rights by Petitioners, lies at the base of Petitioners' argument, is in direct conflict with previous decisions of this Court, and furnishes a compelling reason for review of the Tenth Circuit's decision by this Court.

III. THE DECISION BELOW DOES CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In response to Petitioners' argument that there is great divergence among the Courts of Appeals of other circuits, Respondent asserts that the cases cited are factually distinguishable, and therefore, inapposite.

It is demonstrably true that no case cited in the Petition is factually identical to the instant matter. It is equally true that these cases were cited as illustrations of the positions taken on the *law* involved on this issue by the various circuits, and not for the proposition that any of them govern

this matter by virtue of their factual congruence.

As noted in the Petition, there are no less than three positions prevailing in various Circuits (and a conflict in the Tenth Circuit) on the level of state action, if any, required under § 1985. Respondent's attempted response does not even address that issue, and is really no response at all.

IV. RESPONDENT'S FOURTH ARGUMENT IS YET ANOTHER ATTEMPT TO RAISE AN ISSUE FOR THE FIRST TIME ON APPEAL, AND SHOULD NOT EVEN BE CONSIDERED.

Respondent's Complaint and Response to the Motion for Summary Judgment did not allege or demonstrate that an object of the alleged conspiracy was to deprive him of his right to interstate travel. No attempt was ever made to amend to include such an allegation. When faced with a Motion for Summary Judgment on the § 1985 claim, Respondent produced no affidavits or other information to support a claim based on interference with interstate travel, and thereby elected to rest on the pleadings on this point. No attempt was made to preserve the point in the Statement of Facts relied upon.

This point was raised for the first time on appeal before the Tenth Circuit, where it was dealt with summarily as not warranted by the facts. Respondent is once more attempting to raise an issue for the first time on appeal, and should not now be heard to complain that he failed to do below that which *might* have been allowed if done at an appropriate time. As the Tenth Circuit observed:

> Furthermore plaintiff did not allege in his complaint that an object of defendants' conspiracy was to deprive him of his right to travel interstate. He now urges this as a basis to uphold his claim under § 1985(3). However,

the facts do not lend themselves to a claim of interference with this right.

Taylor v. Gilmartin, supra, 686 F.2d at 1358.

CONCLUSION

Respondent's Brief in Opposition urges no substantial reasons for denial of the Petition for Writ of Certiorari, and in most instances, fails to make any relevant response. Petitioners, therefore, pray that the Petition for Writ of Certiorari be granted.

Respectfully submitted,
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December, 1982.

CERTIFICATE OF SERVICE

The undersigned Albert R. Vermeire, a member of the Bar of this Court and counsel of record for Wayne N. Howard, Petitioner and Cross-Respondent herein, hereby certifies that on the 16th day of December, 1982, he caused to be served the foregoing Petitioners' Reply Brief on all parties to this appeal by mailing three copies thereof by First Class mail, postage prepaid, addressed to their attorneys, as follows:

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